88-86

No. ___

In The

Supreme Court of the United States

October Term, 1988

SHELTER CREEK DEVELOPMENT CORPORATION; LEO A. O'HEARN; MARGARET E. O'HEARN,

Petitioners,

v.

CITY OF OXNARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When a municipality enacts regulations to stop a project that the municipality knows is beyond the lawful reach of its regulatory jurisdiction, and the project is permanently stopped at a great financial loss to the owners, must the owners, despite their exemption from the regulations, nonetheless apply for a permit under the regulations in order to pursue a remedy in federal court asserting a denial of due process and a taking without compensation?

2. Must a person who is lawfully exempt from an ordinance, as determined by a state's highest court, nonetheless forfeit his exemption and submit to the ordinance in order to assert a "ripe" claim under 42 U.S.C. § 1983?

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Ninth Circuit. Shelter Creek Development Corporation has no corporate subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED-Continued

STATUTES

UNITED STATES CONSTITUTION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Leo A. O'Hearn, Margaret E. O'Hearn, and their corporate identity, Shelter Creek Development Corporation, seek review of a decision of the Ninth Circuit Court of Appeals dismissing as not ripe their lawsuit for damages under 42 U.S.C. § 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 838 F.2d 375 (9th Cir. 1988), and is reproduced as Appendix A. The

unpublished decision of the United States District Court for the Central District of California is in the form of signed Tentative Findings of Fact and Conclusions of Law, which are reproduced as Appendix B. The opinion of the California Supreme Court from the preceding action is reported at 34 Cal. 3d 733 (1983), and is reproduced as Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on February 2, 1988, and filed its order denying a petition for rehearing on April 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

California Senate Bill 823, Section 8, enacted as 1979 Cal. Stat. ch. 1192, in pertinent part provides:

> "[N]o such regulation enacted after July 1, 1979, shall affect a stock cooperative conversion if the application for that conversion's public report, including payment of an appropriate fee, was made prior to July 1, 1979."

1983 Cal. Stat. ch. 976, § 1, in pertinent part provides:

> "This section shall become inoperative on June 30, 1984."

Ordinances 1755, 1774, and 1805, enacted by the City of Oxnard, California, are reproduced as Appendices D, E, and F, respectively.

STATEMENT OF THE CASE

The chronology which follows will show that, contrary to the ruling of the Ninth Circuit, petitioners obtained a final decision from the City of Oxnard regarding their property and their case is ripe for adjudication. Indeed, a California trial court specifically held that the City of Oxnard had unconstitutionally applied its ordinance to the petitioners' property. That judgment was subsequently upheld by the California Supreme Court which held that petitioners were not required by state law to pursue the administrative procedure which the Ninth Circuit held to be essential in order to satisfy federal ripeness requirements.

Petitioners believe that some detail of the background of this case will be most helpful in fully understanding the implications of the Ninth Circuit's conclusion that a "federal requirement of ripeness cannot

be altered or abrogated by a decision of a state court construing its own laws." 838 F.2d at 380, Appendix A at A-13. The facts outlined below will also demonstrate that, particularly since petitioners' specific request for a waiver from the ordinance was denied, federal ripeness requirements were clearly met.

In 1978, California law allowed, as it still does, the conversion of apartment complexes to stock cooperatives. A stock cooperative is similar to a condominium. A corporation is formed to take title to the complex, the corporation issues shares of stock equal to the number of units in the complex, then people who wish to purchase a unit buy one unit's share of stock in the corporation. This gives them the right to occupy their unit, and a vote, as a shareholder, over the affairs of the complex. In this way, the corporation ultimately acts as a type of homeowners association.

In 1978, Leo A. O'Hearn and Margaret E. O'Hearn purchased the Shelter Creek apartment complex in Oxnard, California, with the intention of converting the complex to a stock cooperative. Following their purchase, the O'Hearns formed Shelter Creek Development Corporation in order to sell the complex to the corporation and begin issuing shares of stock.

Under California law, shares in a stock cooperative could not be sold until a public report (similar to a prospectus) was obtained from the California Department of Real Estate (DRE). Cal. Bus. & Prof. Code §§ 11004.5, 11010, 11010.2. The O'Hearns applied for the public report and paid the necessary fees in August, 1978.

Before the report was issued,[1] the Oxnard City Council in May, 1979, adopted a moratorium, temporarily banning stock cooperative conversions. *See* Ordinances 1755 and 1774, attached hereto as Appendices D and E.

In September, 1979, the California State Legislature enacted Senate Bill (SB) 823, amending California Government Code § 66424, which is part of California's Subdivision Map Act. 1979 Cal. Stat. ch. 1192, § 1 at 4691-92. This bill prohibited local regulation of stock cooperative conversions except as authorized by the Subdivision Map Act. *Shelter Creek Development Corp. v. City of Oxnard*, 34 Cal. 3d 733, 737-38 (1983). Even where local regulation was authorized by the Subdivision Map Act, however, a "grandfather clause" in SB 823 *exempted* conversion projects from such local regulation if the regulations were enacted after July 1, 1979, and the project's application for a DRE public report and payment of the fee had been completed before July 1, 1979. 1979 Cal. Stat. ch. 1192, § 8(b) at 4695. The O'Hearns qualified for this exemption because, as mentioned earlier, they applied for their DRE public report and paid the fee in August, 1978.

In April, 1980, the Oxnard City Council enacted Ordinance 1805. *See* Appendix F. This ordinance required that a special use permit be obtained for stock cooperative conversions and set forth various physical requirements that the property must meet to qualify for a permit.[2] The

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[1] The O'Hearns' DRE public report was issued in December, 1979.

[2] It is undisputed that Shelter Creek could not comply with certain of the physical requirements of Ordinance 1805, such as a requirement that parking spaces be located within 50 feet of the unit they serve.

ordinance was not authorized by the state Subdivision Map Act. Since the ordinance was enacted after July 1, 1979, the exemption in SB 823 precluded applicaton of the ordinance to the Shelter Creek property. Accordingly, the O'Hearns did not apply for the special use permit. At this point in time they had their DRE public report in hand and that constituted all the permission they legally needed to carry out their conversion.

Prior to the enactment of Ordinance 1805, upon the insistence of their lender and their title insurance company, the O'Hearns attempted to avoid a conflict with the ordinance by informing the city that the Shelter Creek conversion project was exempt from the proposed ordinance because of the grandfather clause in SB 823. The O'Hearns attended the city council meetings where Ordinance 1805 was given its first and second readings prior to adoption, and requested the city council to acknowledge SB 823 and to provide an exemption from the ordinance for projects like Shelter Creek. *See* minutes of March 25, 1980, city council meeting, and minutes of April 1, 1980, city council meeting, which were plaintiffs' trial Exhibits 212 and 213 in the District Court, attached hereto as Appendices G and H, respectively. Unfortunately, a motion to acknowledge Shelter Creek's exemption was defeated. Appendix G at G-3. Instead, a second motion to adopt the ordinance in a form that applied to Shelter Creek was passed. *Id.*; Appendix H at H-2.

After Ordinance 1805 was passed by the city council, the O'Hearns petitioned the city council for a waiver from the requirements of the ordinance. *See* letter from Shelter Creek Development Corporation to Oxnard City

Council dated April 16, 1980, which was plaintiffs' trial Exhibit 221 in the District Court, attached hereto as Appendix I.

The request for a waiver was considered by the council on April 22, 1980, and the council referred the matter to the planning commission and the city attorney to review the request and report back on it. *See* excerpt from minutes of April 22, 1980, city council meeting, which was plaintiffs' trial Exhibit 222 in the District Court, attached hereto as Appendix J. The report from the planning director recommended denial of the waiver and stated that, since a similar request by Shelter Creek had been considered and rejected when the ordinance was passed, no other administrative or legislative remedy was available. *See* memorandum from planning director to city manager dated May 1, 1980, which was plaintiffs' trial Exhibit 225 in the District Court, attached hereto as Appendix K. The city attorney's report said that, despite the exemption provided by the State Legislature in SB 823, the city "probably" could impose Ordinance 1805 upon the Shelter Creek project under some residual police power authority. *See* memorandum from city attorney to city council dated May 21, 1980, which was plaintiffs' trial Exhibit 229, attached hereto as Appendix L.

On May 27, 1980, the city council again considered Shelter Creek's request for a waiver, together with the reports from the planning commission and the city attorney. A vote was taken on the request, and it was denied. *See* minutes of May 27, 1980, city council meeting, which was plaintiffs' trial Exhibit 230 in the District Court, attached hereto as Appendix M at M-2.

Mr. O'Hearn testified at trial in the District Court that he asked and was told at that city council meeting that the council's decision to apply Ordinance 1805 to his project was a final decision, and that "there was no other administrative relief or legislative relief [he] could obtain." *See* excerpt of reporter's transcript, attached hereto as Appendix N at N-1, N-2.

The city council's formal and final decision to enforce the ordinance against the Shelter Creek complex, despite the state law exemption, "effectively barred" the O'Hearns from pursuing conversion to a stock cooperative under the DRE public report because without city approval they were unable to obtain the necessary title insurance and funding. Appendix B (District Court's findings of fact) at B-4. *See also* Appendix A (Court of Appeals' decision) at A-3.

In June, 1980, the O'Hearns filed an action in state court seeking a declaration that, as a matter of state law, the City of Oxnard was exceeding its police power by applying Ordinance 1805 to their project in light of the exemption contained in SB 823. In December, 1980, the state trial court granted the O'Hearns' motion for summary judgment. The O'Hearns argued in their motion for summary judgment that the city's application of Ordinance 1805 to them in the face of an exemption from local regulation exceeded the city's police power and was therefore unconstitutional. The trial court agreed, stating in its judgment: "Oxnard Ordinance No. 1805 is . . . unconstitutional as applied to the Shelter Creek Apartment Complex . . . . Defendants City of Oxnard and City Council of Oxnard . . . are permanently enjoined . . . from

enforcing Oxnard Ordinance No. 1805 as against Plaintiffs' Project." *See* Judgment of the Superior Court for the County of Ventura, filed December 8, 1980, attached hereto as Appendix O.

The city appealed. In October, 1983, the California Supreme Court affirmed the trial court's judgment. The court ruled, just as the O'Hearns had maintained all along, that since the O'Hearns had applied and paid for their DRE public report prior to July 1, 1979, and since the Oxnard ordinance was passed after the effective date of SB 823, the O'Hearns were exempt from any local regulation of stock cooperative conversions. *Shelter Creek*, 34 Cal. 3d at 737-38 (Appendix C at C-5). The city never had any right to include Shelter Creek within the reach of its ordinance.

The California Supreme Court's ruling constituted a final decision of the state courts that the City of Oxnard exercised its regulatory jurisdiction over the O'Hearns unlawfully. At this point, however, their victory was symbolic only. One month earlier, in September, 1983, the Legislature had passed another bill, amending the original language of SB 823 so as to repeal the exemption the O'Hearns had been fighting for. *See* 1983 Cal. Stat. ch. 976, § 1 at 3486-87. There was not enough time for the O'Hearns to carry out their project before the bill repealing the O'Hearns' exemption took effect.[3]

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[3] In a subsequent lawsuit brought by another apartment owner who did not qualify for the exemption, the California Supreme Court ruled that Ordinance 1805 was constitutional, at least as applied to condominium conversions. *Griffin Development Co. v. City of Oxnard*, 39 Cal. 3d 256 (1985).

On May 7, 1982, the O'Hearns filed their complaint in federal District Court pursuant to 28 U.S.C. § 1331. By this federal action the O'Hearns seek damages under 42 U.S.C. § 1983 contending that a valuable interest in property was taken and their constitutional right to due process of law was violated by the unlawful application of Ordinance 1805 to the Shelter Creek conversion. The city does not now dispute that the O'Hearns had a protected property interest in converting the complex into a stock cooperative. Appendix B at B-6. Nor can it be disputed, in light of the decisions in the state action, that the city obstructed that conversion by unlawfully exceeding its police power. The only issues that remain are: (1) was it a violation of the O'Hearns' constitutional rights for the city to obstruct their conversion by the unlawful extension of its ordinance to persons who are rightfully beyond its reach, and (2) is the O'Hearns' claim for damages ripe for adjudication? The District Court ruled that the O'Hearns should have waived their exemption and should have applied for the special use permit required by Ordinance 1805. Appendix B at B-6, B-7. It also ruled that, although the city's actions were unlawful according to the state Supreme Court, they were taken in good faith and so the city should not be liable for damages. *Id.* at B-7. For those reasons, the District Court denied relief on the merits.

The Ninth Circuit on appeal held that the decisions of this Court, most notably *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), required the O'Hearns to apply for the special use permit, as held by the District Court. *Shelter Creek Development Corp. v. City of Oxnard,* 838 F.2d

at 377-80 (Appendix A at A-6 through A-13). Since this prerequisite was not satisfied, the court ruled, the O'Hearns' federal action is not ripe. The Ninth Circuit vacated the District Court's decision on the merits and remanded with instructions to dismiss the action. 838 F.2d at 380 (Appendix A at A-13).

The O'Hearns believe their repeated efforts to have their exemption recognized by the city, coupled with their subsequent request for a waiver, satisfied the federal courts' need for finality and that the Ninth Circuit's requirement that they forfeit their exemption and submit to an ordinance that does not lawfully apply to them is an unreasonable price to pay for admission to the federal courts. The Ninth Circuit's ruling evidences a misunderstanding of this Court's demand for finality.

REASONS FOR GRANTING THE WRIT

A. The Decision in Shelter Creek Is Part of a Trend Systematically Misapplying Williamson County

This Court's decision in *Williamson County* has been developed by certain panels of the Ninth Circuit Court of Appeals into a pat formula which is mechanically applied in all cases involving the regulation of land use. The formula is invoked as follows: "[A] final determination consists of two elements, a rejected development plan and denial of a variance." *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir. 1988). *See also Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876 (9th Cir. 1988) ("[t]his final determination requires two decisions against the Ranch: a rejected

development plan and the denial of a variance"); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d at 378-79 (" 'the "final decision" . . . requires at least two decisions against [landowners]: (1) a rejected development plan, and (2) a denial of a variance' "); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) ("[*Williamson County*] requires at least two decisions against the Kinzlis: (1) a rejected development plan, and (2) a denial of a variance").

The result of the mechanical application of this formula has been to turn away cases from the federal courts on the grounds that they do not present "final decisions" for review when in fact the decisions are as final as they can get.

For example, in *Kinzli v. Santa Cruz*, the Kinzlis' property was downzoned to open space by a voter initiative. The Kinzlis sued the city alleging a taking and a denial of due process. The Ninth Circuit threw them out of court to go seek a "variance" even though under California law the city council had no discretion to waive or adjust the requirements of an ordinance that had been enacted by voter initiative. *See* Cal. Elec. Code § 4013. Their variance request will be asking the city to violate state law and is therefore a waste of everyone's time and money.

Williamson County was again misapplied in *Lake Nacimiento Ranch v. County of San Luis Obispo*. In that case the owner of severely restricted land applied for a general plan amendment which was turned down. The owner believed it was entitled to the amendment and sued. The Ninth Circuit dismissed the case because the owner had

not sought a permit for its project after the general plan amendment failed. Under California law the county is *required* to reject a development proposal that is inconsistent with the general plan. Cal. Gov't Code § 66474(a). Unless the court is banking on the possibility that the county will violate a state statute, the demand for "more finality" was unreasonable.[4]

The present case is the most recent and most egregious of the injustices caused by the mechanical application of the Ninth Circuit's *Williamson County* formula. The O'Hearns are seeking damages because the City of Oxnard unlawfully asserted its regulatory jurisdiction over them, with full knowledge of their exemption, so as to frustrate their conversion plans. The Ninth Circuit's decision that their case is not ripe because they did not apply for the unneeded permit applies the *Williamson County* formula to another situation where it serves no judicial purpose–except to reduce the court's caseload, which is certainly not justification in itself for leaving the violation of constitutional rights unredressed. Borrowing the metaphor in *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984), *Williamson County* is not a magic wand that can make every Section 1983 action involving land use regulation disappear from the court's docket.

Further guidance from this Court is necessary so that a meaningful analysis of the policies underlying *Williamson County* will replace the assembly-line dismissal of

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[4] *Lake Nacimiento Ranch* is the subject of a pending petition for certiorari.

cases now occurring. When a final decision by government has caused a concrete injury, the injured party should not be denied his day in court just because there were no "permits" or "variances" involved in his fact pattern.

B. The Issue of Whether Finality Has Been Achieved Looks to Whether It Has Been Achieved Under State Law

California courts have followed this Court's precedents regarding the ripeness of claims for damages. *See, e.g., Searle v. City of Berkeley Rent Stabilization Board,* 197 Cal. App. 3d 1251, 1259 (1988); *Guinnane v. City and County of San Francisco,* 197 Cal. App. 3d 862, 868-69 (1987). The issue of ripeness was accordingly raised in the California Supreme Court's opinion in *Shelter Creek.* Chief Justice Bird's dissenting opinion argued:

> "In this case, plaintiffs have never applied for a special use permit pursuant to the city ordinance nor sought a variance from the conversion regulations. . . . [U]nless plaintiffs can establish as a matter of law that they are excused from [this] exhaustion requirement, this case is not properly before the courts." 34 Cal. 3d at 738 (Bird, C.J., dissenting) (Appendix C at C-7).

The majority, however, decided the merits of the case. The dissent's contention was easily disposed of:

> "[Plaintiffs] made no application to the city for the special use permit required by Ordinance No. 1805.[1] [Footnote 1] Plaintiffs were excused from making such an application because, as we shall conclude, they were exempted from the entire ordinance by operation of the grandfather clause of the statute." 34 Cal. 3d at 736 and n.1 (Appendix C at C-4).

The District Court, in ruling that the O'Hearns should have applied for a permit, cited repeatedly to Chief Justice Bird's dissenting opinion for support. *See* Appendix B at B-6, B-7. Although dispensing with the citations to the dissenting opinion of the state court, the Ninth Circuit perpetuated the conflict by also ruling that the O'Hearns should have applied for a permit, even though the California Supreme Court in its majority opinion rejected that reading of state law. The Ninth Circuit opinion states:

> "Plaintiffs maintain, however, that a ruling by this court that their claim is not ripe, absent an application for a special use permit, would be inconsistent with the ruling of the California Supreme Court that plaintiffs need not seek such a permit prior to converting the apartment complex to a stock cooperative. *See Shelter Creek*, 34 Cal.3d at 736 n. 1, 669 P.2d at 949 n. 1, 195 Cal.Rptr. at 362 n. 1. This argument erroneously assumes that ripeness requirements under federal law must be consonant with state law permit requirements." *Shelter Creek*, 838 F.2d at 380 (Appendix A at A-12, A-13).

This is an indefensible position for the Court of Appeals to take since, in cases like *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), this Court *relied* upon state court interpretations of state law permit requirements to determine whether federal claims were ripe. *See MacDonald, Sommer & Frates*, 477 U.S. at 352-53. The Ninth Circuit is transmuting this Court's procedural requirement of a final decision into a federal substantive rule of what a final decision is. This Court should grant certiorari for the additional purpose, then, of correcting this conflict between the California Supreme Court and the Ninth Circuit on the federal question of ripeness.

C. The Decision in Shelter Creek Extends the Requirements in Williamson County to Areas This Court Did Not Intend for Them to Go

It is clear from the language in several of this Court's decisions that this Court did not intend a systematic "permit-plus-variance" rule to eject claimants from federal court when it would not assist this Court's ability to review their cases. In *MacDonald,* for example, where landowners sued claiming that the county had taken their property by denying all economic use of it, 477 U.S. at 344, the Court wrote:

> "Until a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.' . . . Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates,* 477 U.S. at 349, 351.

Thus, *Williamson County's* requirement of a rejected permit and variance request applies when the plaintiff's theory is that regulation has denied the "reasonable beneficial use" of his property. The requirement that the plaintiff must seek a permit and a variance is based on the Court's consequent need to know the "nature and extent of permitted development."

The O'Hearns' claim is *not* based on the theory that Oxnard denied them all beneficial use of their complex. They readily acknowledge that their ability to continue

renting their units as apartments constitutes an economically viable, albeit less profitable, use. Instead, the O'Hearns' claim is based upon the distinct theory that Oxnard's inclusion of their complex under the proscriptions of Ordinance 1805 advanced no legitimate state interest. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (regulation effects a taking "if the ordinance does not substantially advance legitimate state interests"). Indeed, California's legislatively declared state interest was in granting the O'Hearns an *exemption* from such local regulation.

This Court's finality requirement, in its own words, "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County*, 473 U.S. at 193. That concern is completely satisfied by the final decision of the City of Oxnard to not exempt Shelter Creek from Ordinance 1805, nor to waive compliance with its permit requirement.

That a request for a waiver satisfies the Court's need for finality in situations like this is borne out by the opinion in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981):

> "There is no indication in the record that appellees have . . . request[ed] either a variance . . . *or a waiver* from the surface mining restrictions in § 522(e)." *Id.* at 297 (emphasis added).

Thus, when a request for a waiver is appropriate, it satisfies the Court's need for finality just like a request for a variance would. A request for a waiver was appropriate for the O'Hearns because a variance request, while appealing for relaxed conditions, still *seeks a permit*. The

O'Hearns were attempting to exercise their exemption from Oxnard's permit requirement. Their preenactment requests for an exemption to be written into Ordinance 1805, and their postenactment request for a waiver of the requirements of Ordinance 1805, including the permit requirement, were thus the proper procedure for the O'Hearns to follow.

A case very much on point, which discusses this Court's need for finality in the context of an exemption case is *Frozen Food Express v. United States*, 351 U.S. 40 (1955). In that case Congress passed a law requiring common carriers to obtain a permit from the Interstate Commerce Commission. Congress provided an exemption from the permit requirement, however, for operators carrying meat, fish, or "agricultural commodities." The commission took it upon itself to define what Congress meant by "agricultural commodities" and issued an order listing specified commodities that it regarded as not "agricultural." The result of the order was that carriers transporting items on the commission's list would have to obtain a permit. Frozen Food Express, a common carrier that transported some of the items on the commission's list, filed suit in federal court to enjoin enforcement of the commission's order, claiming that it was entitled to the exemption intended by Congress. The commission defended on the ground that Frozen Food's action was not ripe because the commission had not as yet prevented Frozen Food from transporting the items it claimed were exempt. This Court rejected the commission's defense. Unlike the Ninth Circuit, this Court did not suggest that Frozen Food should have applied for a permit on the misguided theory that if the permit were issued, that

would have obviated the need for a lawsuit to enforce the exemption. Rather, the Court assumed that Frozen Food was entitled to stand firm on its rights by not applying for a permit, and stated that the case was nonetheless ripe because "[t]he 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs." *Id.* at 44. The Court pointed out that, although the commission had not yet enforced its order against Frozen Food, the order nonetheless existed as part of the law and third party shippers of commodities on the commission's list would in practicality refuse to do business with Frozen Food once they discovered Frozen Food had no permit for those commodities.

The Court's reasoning on the issue of ripeness in *Frozen Food* applies to the action brought by the O'Hearns. By participating in the legislative process and thereafter making a formal request for a waiver, and then going to state court for a declaratory judgment by the state's highest court, the O'Hearns have presented a case that is even more final than the one presented by Frozen Food. The O'Hearns were entitled to stand on their exemption as Frozen Food did. That they did not submit to the ordinance and give the city a chance to grant them a permit cannot be criticized. That third parties (lenders and title insurers) refused to do business with them is a judicially recognized consequence of the city's action and constitutes a valid basis for their claim for damages.

In *Pennell v. City of San Jose*, 485 U.S. ___, 99 L. Ed. 2d 1 (1988), this Court recently dealt with the issue of when a case becomes "ripe" for judicial review. There the

majority found that since the ordinance had not yet affected the landlords' rents, the case did not present a sufficiently concrete factual setting for the adjudication of a taking claim. In the instant case, however, the O'Hearns were clearly subjected to the reach of Oxnard's ordinance, and were "effectively barred" from converting their complex because of it, even though they were exempt from its provisions under state law. In this situation, the views expressed by Justice Scalia in his dissent in *Pennell* (concurred in by Justice O'Connor) take on added meaning. Justice Scalia's analysis demonstrates that a federally imposed requirement for a permit application, which is not required by state law, would not in any way assist in the inquiry of whether Oxnard's application of its ordinance to the O'Hearns, by its refusal to grant a waiver from the ordinance's requirements, substantially advanced a legitimate governmental interest:

> "[T]he present . . . challenge is not premature, because it does not rest upon a ground that would even profit from consideration in the context of particular application. As we said in Agins, a zoning law 'effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.' Id., at 260, 65 L Ed 2d 106, 100 S Ct 2138. The present challenge is of the former sort. Appellants contend that providing financial assistance to impecunious renters is not a state interest that can legitimately be furthered by regulating the use of property. Knowing the nature and character of the particular property in question, or the degree of its economic impairment, will in no way assist this inquiry. Such factors are as irrelevant to the present claim as we have said they are to the claim that a law effects a taking by authorizing a permanent physical invasion of property. See

Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164 (1982)." *Pennell*, 99 L. Ed. 2d at 18-19.

This rationale applies even more forcefully here. Asking the City of Oxnard for a permit, so that it could be determined whether or not the city would grant them permission to convert, would not change the fact that the city should not have been imposing its permit requirement upon the O'Hearns. It is the unauthorized assertion of regulatory jurisdiction that forms the basis of the O'Hearns' claim. That assertion of illegitimate authority occurred, and caused its harm, when the city made its final decision not to exempt the O'Hearns from the ordinance and not to waive application of the ordinance to their project.

In point of fact, although it was not mentioned in the statement of the case, after their window of opportunity under SB 823 closed, and they could no longer claim an exemption from the city's ordinance, the O'Hearns did apply for a permit. The permit was denied by the city planning commission and the O'Hearns' appeal to the city council was also denied because they found that the Shelter Creek complex did not comply with the physical requirements of Ordinance 1805. *See* excerpt of reporter's transcript, attached hereto as Appendix P. Now that this fact has been disclosed, it becomes obvious that its existence does not assist the analysis. Whether the city had granted or denied the permit would not change the fact that the city, by interposing its ordinance, prevented the O'Hearns from taking advantage of their window of opportunity under SB 823 to convert free of local regulation. Thus their claims are ripe for review.

D. Williamson County's Permit and Variance Requirement Should Not Apply to Due Process Claims of the Type Advanced in This Case

The Ninth Circuit in the opinion below ruled that the O'Hearns' due process claim was premature for the same reason their taking claim was premature–"plaintiffs never applied for a variance or special use permit." 838 F.2d at 379 (Appendix A at A-11). The court's analysis of their due process claim was reduced to this sweeping statement:

> "[E]qual protection claims and substantive due process claims are to be analyzed for ripeness in the same way that regulatory taking claims are analyzed." 838 F.2d at 379 (Appendix A at A-10).

This is an erroneous overstatement of this Court's holding in *Williamson County.*

It is true that in *Williamson County* this Court turned away the bank's due process claim as unripe for the same failure to seek a permit and variance that spoiled its taking claim. But it was because the bank's due process claim was really the same taking claim dressed in due process clothing.

> "[U]nder [the bank's] theory . . . regulation that goes so far *that it has the same effect as a taking* by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause . . . ." 473 U.S. at 197 (emphasis added).

This Court was not creating a blanket rule that every factual situation which does not present a ripe taking claim will not be considered by the federal courts although a different constitutional injury may be alleged.

Rather, because of the overlapping of the *Williamson County* claimant's due process and taking theories, the Court was faced with the same need for additional information in order to review that due process claim:

> "Viewing a regulation that 'goes too far' as an invalid exercise of the police power, rather than as a 'taking' . . . does not resolve the difficult problem of how to define 'too far' . . . ." *Id.* at 199.

As stated elsewhere in this petition, the O'Hearns are not arguing that Ordinance 1805 went too far. The mere fact that it went to them at all is the basis for their claim. The O'Hearns had a statutory right to convert their complex under the DRE report. Oxnard's decision to pass laws regulating the O'Hearns' stock cooperative conversion in the face of paramount state law prohibiting local regulation of their project was arbitrary and capricious. "The Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.' " *Daniels v. Williams*, 474 U.S. 327, 331 (1986). It was Oxnard's arbitrary exercise of governmental power, depriving them of a property interest created by state statute (*see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)), which forms the basis of the O'Hearns' substantive due process claim.

Considering the nature of their claim, there is clearly no need for "more finality." The California Supreme Court has already ruled that Oxnard had no authority to regulate the Shelter Creek conversion and therefore acted without justification when it denied Shelter Creek's requests for exemption or waiver. The arbitrary exercise of governmental power is thus already established. Oxnard's denial or approval of the unneeded special use

permit would add nothing to the analysis. The invalid extension of regulatory jurisdiction over someone who is rightfully exempt from it is an injury in itself. The fact that Oxnard might have granted the special use permit if the O'Hearns had submitted to the ordinance would not have legitimized the ordinance, nor corrected the due process violation.

Now that it is clear that the O'Hearns' due process claim is not merely a recasting of a claim that Ordinance 1805 deprived them of all beneficial use of their property, it should be equally clear that their claim is not automatically unripe. In *Pennell* this Court recognized that due process claims of the sort pled here are ripe for review, even when a taking claim is not. In that case due process claims were advanced on two different theories. One theory was a recasting of a taking claim, as in *Williamson County*. At the conclusion of its discussion of the prematurity of the taking claim, the Court said of that due process theory:

> "For this reason we also decline to address appellants' contention that [the tenant hardship provision] violates the Fourteeth Amendment's due process . . . requirements." 99 L. Ed. 2d at 13 n.5.

The *other* due process claim, however, which asserted that the San Jose ordinance was arbitrary, was considered by the Court on its merits. *See* 99 L. Ed. 2d at 14-15.

Other circuits faced with this issue have allowed due process claims to proceed even though complaints include a taking claim that is unripe. *See, e.g., Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986), and cases cited therein.

The Ninth Circuit's automatic rejection of the O'Hearns' due process claim is out of step with the rulings of this Court and these sister courts.

CONCLUSION

The Ninth Circuit has fashioned this Court's *Williamson County* decision into a handy formula for clearing its docket of all land use cases that do not allege the denial of a "permit" and a "variance." Although the O'Hearns are victims of city officials wielding the heavy hand of government power when they had no right to do so, the O'Hearns' federal claim has been swept out of court by the Ninth Circuit's overbroad ripeness formula. The unfairness of the Ninth Circuit's formula can be seen in the Catch-22 it creates in this case, where the court in essence has told the O'Hearns, "if you want to challenge the deprivation of this right (to convert without obtaining a permit), you must waive this right."

Justice White, in his dissent in *MacDonald*, concurred in by Justices Powell, Rehnquist, and former Chief Justice Burger, said:

> "[T]he final decision requirement is necessary to ensure that 'the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.' . . . Nothing in our cases, however, suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position." 477 U.S. at 359 (White, J., dissenting).

In this case, where the City of Oxnard was asked to exempt the O'Hearns' project and it refused, was asked to grant a waiver and it refused, was asked if its decision was final and it said yes, the Ninth Circuit has all the information it needs to review the O'Hearns' federal claims. It dealt unfairly with the O'Hearns' and other federal litigants it has thrown out of court under its excessive reading of *Williamson County*. The O'Hearns accordingly request this Court to grant their petition for the purpose of clarifying the federal courts' need for finality when constitutional claims are based upon an owner's exemption from an ordinance.

DATED: July, 1988.

Respectfully submitted,

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APPENDIX A

SHELTER CREEK DEVELOPMENT CORPORATION;
Leo A. O'Hearn; Margaret E. O'Hearn,
Plaintiffs-Appellants,

v.

CITY OF OXNARD,
Defendant-Appellee.

No. 86-6608.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Nov. 2, 1987.
Decided Feb. 2, 1988.

* * *

Donald R. Colvin, Los Angeles, Cal., for plaintiffs-appellants.

K.D. Lyders, City Attorney, Oxnard, Cal., for defendant-appellee.

Robert K. Best, Pacific Legal Foundation, Sacramento, Cal., for amicus.

Appeal from the United States District Court for the Central District of California.

Before ALARCON and NELSON, Circuit Judges, and MUECKE,* District Judge.

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* Honorable Carl A. Muecke, District Judge, District of Arizona, sitting by designation.

ALARCON, Circuit Judge:

Shelter Creek Development Corporation (Shelter Creek), Leo A. O'Hearn and Margeret E. O'Hearn (the O'Hearns) appeal from a judgment for the City of Oxnard (the City) in an action under 42 U.S.C. § 1983 (1982) challenging the constitutionality of the City's ordinance as applied to their property. We conclude that the matter is not ripe for judicial adjudication. We vacate the district court's judgment on the merits and remand with an order that the matter be dismissed.

I. FACTS

In January 1978, the O'Hearns purchased the Shelter Creek apartment complex in the City of Oxnard. Thereafter, the O'Hearns formed Shelter Creek in order to convert the apartment complex from rental units to a stock cooperative form of ownership.

Beginning in May 1979, the City undertook to regulate the conversion of rental apartments to stock cooperatives. Following a series of interim ordinances, the City adopted Ordinance No. 1805 on April 1, 1980. Ordinance No. 1805 required, *inter alia*, that units to be converted into stock cooperatives substantially comply with a wide range of building and parking restrictions applicable to new residential condominiums.

Prior to the enactment of Ordinance No. 1805, the O'Hearns informed the City of their position that enactment of the ordinance without an express exemption for the Shelter Creek apartment complex would be contrary to state law. The O'Hearns relied on California Senate Bill

(SB) 823, effective January 1, 1980, which expressly included stock cooperatives within the definition of a "subdivision" under the Subdivision Map Act, Cal.Gov't Code § 66424 (West 1983). SB 823 contained a "grandfather clause" that exempted stock cooperative conversions from local control "under the provisions of the Subdivision Map Act," if the application for a public report and required fees had been submitted to the California Department of Real Estate prior to July 1, 1979. Because the O'Hearns had applied and paid the fees for a public report prior to July 1, 1979, they argued, SB 823 precluded the City from regulating the Shelter Creek conversion.

The City rejected the O'Hearns' position, concluding that it had power apart from the Subdivision Map Act to regulate the proposed Shelter Creek conversion. Accordingly, Ordinance No. 1805 was enacted with no exemptions. As so enacted, the ordinance effectively barred the O'Hearns from pursuing conversion of the Shelter Creek complex to a stock cooperative because they were unable to obtain the necessary insurance and funding absent the approval of the City.

It was not economically feasible or physically possible for the Shelter Creek apartment complex to comply with several of the restrictions imposed by Ordinance No. 1805. Ordinance No. 1805 provided for the issuance of special use permits. Neither Shelter Creek nor the O'Hearns, however, applied for a special use permit, nor did they formally request a variance. Instead, approximately two months after the City's enactment of Ordinance No. 1805, Shelter Creek and the O'Hearns instituted an action in Ventura County Superior Court.

They sought a declaration that the ordinance was unconstitutional and that it was inapplicable to the Shelter Creek apartment complex because of the grandfather clause in SB 823.

The case was ultimately appealed to the California Supreme Court. That court agreed that the Shelter Creek apartment complex was exempt from the application of Ordinance No. 1805 because of the grandfather clause. *Shelter Creek Dev. Corp. v. City of Oxnard*, 34 Cal.3d 733, 669 P.2d 948, 195 Cal.Rptr. 361 (1983). The court expressly declined to address the constitutionality of the ordinance. *Id.* at 735, 669 P.2d at 948, 195 Cal.Rptr. at 361.[1]

Following the successful conclusion of their state court proceedings, plaintiffs instituted the present action under 42 U.S.C. § 1983 (1982). They alleged that the City's policy of regulating conversion of apartments to stock cooperatives was directed solely at plaintiffs and one

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[1] We were informed at oral argument that after their victory in the California Supreme Court, plaintiffs abandoned their plan to convert the Shelter Creek apartments to a stock cooperative, apparently because of changed market conditions. Plaintiffs decided, instead, to convert the apartments to condominiums. Accordingly, they applied to the City's planning commission for a special use permit. The commission denied their application, and the city council affirmed the denial. Plaintiffs do not challenge these denials in the present action, which concerns only the constitutionality of Ordinance No. 1805 as applied to plaintiffs' initial proposal to convert to a stock cooperative. Plaintiffs' later application for a special use permit in connection with a different proposal is irrelevant to our decision in this matter and does not affect our conclusion that this matter is unripe for adjudication.

other developer. They further alleged that implementation of the policy deprived plaintiffs of equal protection of the laws. They also claimed that the ordinance was unconstitutional, both on its face and as applied. They contended that because the restrictions on conversion were not rationally related to legitimate governmental purposes, Ordinance No. 1805 deprived them of a property interest without due process of law.[2]

Following a bench trial, the district court entered judgment for the City. Shelter Creek and the O'Hearns appeal from that judgment.

II. JURISDICTION

This court has jurisdiction over the appeal from the district court's final judgment under 28 U.S.C. § 1291 (1982). The appeal was timely filed.

The question of ripeness goes to our subject matter jurisdiction to hear the case.

See Duke City Lumber Co. v. Butz, 539 F.2d 220, 221 n. 2 (D.C. Cir. 1976) (per curiam) (question of ripeness may be raised sua sponte by appellate court because it goes to court's subject matter jurisdiction), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 737, 50 L.Ed.2d 751 (1977). We must review and decide the question de novo. *See Peter Starr Prod. Co. v. Twin Continential Films, Inc.*, 783 F.2d 1440, 1442 (9th

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[2] On this appeal, plaintiffs have abandoned their argument that the ordinance is unconstitutional on its face. We, therefore, express no opinion on that issue.

Cir. 1986) ("Subject matter jurisdiction presents a question of law, reviewable de novo by this court.")

III. ANALYSIS

Both the Supreme Court and this court have declared that until a landowner seeks a permit or a variance under a governing land use or zoning ordinance, any claim that the ordinance is unconstitutional as applied to the landowner's property is not ripe for judicial adjudication.

In *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the appellants claimed that a municipal zoning ordinance was unconstitutional on its face because it took their unimproved land without just compensation, in violation of the fifth and fourteenth amendments. The Supreme Court ruled that because the ordinance, as authoritatively construed by the state court, permitted appellants to construct as many as five residences on their property, the ordinance was not facially unconstitutional. *Id.* at 260, 262-63, 100 S.Ct. at 2141, 2142-43. The Court declined, however, to address the question whether the ordinance could constitutionally be applied to prevent appellants from building the full complement of five homes: "Because the appellants have not submitted a plan for development of their property as the ordinance permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions." *Id.* at 260, 100 S.Ct. at 2141; *accord MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) (declining to rech merits of taking claim where landowner had failed to secure city's final position regarding application of the challenged

zoning regulations to landowner's property); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297, 101 S.Ct. 2352, 2371, 69 L.Ed.2d 1 (1981) (constitutionality of application of Surface Mining Control and Reclamation Act not ripe for adjudication where "[t]here [was] no indication in the record that appellees . . . availed themselves of the opportunities provided by the Act to obtain administrative relief" by requesting a variance or a waiver of Act's requirements).

In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Court found a landowner's regulatory taking claim to be premature under *both* the Just Compensation Clause of the fifth amendment and the Due Process Clause of the fourteenth amendment because the landowner had failed to seek a variance from the challenged ordinance and regulations. *Id.* at 186, 199-200, 105 S.Ct. at 3116, 3123-3124. The Court explained that whether an ordinance is challenged as a taking for which just compensation must be paid under the fifth amendment or as an invalid exercise of police power under the fourteenth amendment, the courts are in no position to assess the constitutionality of the ordinance "until a final decision is made as to how the regulations will be applied to [the landowner's] property." *Id.* at 200, 105 S.Ct. at 3124.

The landowner in *Hamilton Bank*, like plaintiffs in the present case, argued that landowners should not be required to seek variances when suit is predicated on 42 U.S.C. § 1983, given the Court's earlier holding that exhaustion of administrative remedies is not a prerequisite to a section 1983 action. *Id.* at 192, 105 S.Ct. at 3120. *See Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557,

73 L.Ed.2d 172 (1982) (reaffirming prior rulings that exhaustion of state administrative remedies is not a prerequisite to an action under section 1983). The Court rejected the landowner's argument, explaining that "[t]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable." 473 U.S. at 192, 105 S.Ct. at 3120.

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.

Id. at 193, 105 S.Ct. at 3120. A landowner, therefore, can be required to seek a variance from the terms of the challenged ordinance before instituting a section 1983 action attacking application of that ordinance. Because the landowner in *Hamilton Bank* failed to do so, its attack was not ripe for adjudication. *Id.* at 193-94 199-200, 105 S.Ct. at 3120-21, 3123-24.

In the recent case of *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), we applied the above-described ripeness doctrine and ordered dismissal of an action challenging a zoning ordinance. In *Kinzli*, the Santa Cruz City Council enacted an ordinance implementing an initiative measure previously approved by the voters. The ordinance limited the uses available to greenbelt land, which included plaintiff landowners' property. The ordinance also barred extension of urban services to greenbelt land,

except in certain limited circumstances. However, the ordinance allowed several specific uses under special use permits. *Id.* at 1452.

The landowners in *Kinzli* attempted to sell their property under a contract conditioned on city approval of residential development. The potential purchaser filed an application for such approval, but abandoned the application on being informed by a city engineer that the city could not provide water services to the property. *Id.*

Without submitting a follow-up application for a permit allowing any other use of the property, the landowners instituted a section 1983 action in federal court, alleging that application of the ordinance to their property constituted a taking without just compensation, a denial of equal protection, and a denial of substantive due process. The district court ruled that the substantive due process claim was not ripe for adjudication, but reached the merits of the other claims, finding against the landowners on each. *Id.* at 1452-53.

We reversed and ordered vacation of the district court's rulings on the merits. We concluded that *none* of landowner's claims was ripe for adjudication. Relying on the Supreme Court's decisions in *Hamilton Bank* and *MacDonald*, we explained that a landowner seeking to challenge application of a land use ordinance to his property must first obtain "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *Id.* at 1453 (quoting *MacDonald*, 106 S.Ct. at 2566). Absent an application for a variance, no such final and authoritative determination can be shown:

> [T]he "final decision" which inflicts a concrete injury on the plaintiff and is ripe for adjudication as a claim of a regulatory taking, even if the claim is brought under 42 U.S.C. § 1983, requires at least two decisions against [landowners]: (1) a rejected development plan, and (2) a denial of a variance. [Landowners] have not secured or even attempted to secure either of these two requisite decisions.

Id. at 1454 (citation omitted).

We acknowledged that under the "futility exception" to the threshold requirement of a final determination, submission of a development plan is excused if the submission would be an " 'idle and futile act.' " *Id.* (quoting Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1146 n. 2 (9th Cir.), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983)). We held, however, that the "futility exception" is unavailable unless and until landowner has submitted at least one "meaningful application" for development of the property and one "meaningful application" for a variance. *Id.* at 1455 & n. 6; *accord Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 980 (9th Cir. 1987). The landowners in *Kinzli* had failed to satisfy these requirements. Moreover, the application originally filed by the potential purchaser of the property had not been meaningful because it had been abandoned of an early stage of the approval process. 818 F.2d at 1455.

We also left no doubt that equal protection claims and substantive due process claims are to be analyzed for ripeness in the same way that regulatory taking claims are analyzed: "[T]he [landowners'] equal protection claim is not ripe for consideration by the district court 'until planning authorities and state review entities make a

final determination on the status of the property.' The [landowners'] equal protection claim therefore is not ripe, just as their taking claim is not ripe." *Id.* at 1455-56 (quoting *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986)). Likewise, the landowners' due process claim was not ripe because they had failed to "obtain final decisions regarding the application of the regulations to their property and the availability of variances." *Id.* at 1456; *accord Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987) (2-1) (*Kinzli*'s final decision requirement applies to substantive due process and equal protection claims).

Applying the foregoing principles to the matter now before us, it is clear that plaintiffs' challenge to Ordinance No. 1805 is not ripe for judicial adjudication. Plaintiffs unsuccessfully sought to have the City enact the ordinance with an express exemption for the Shelter Creek apartment complex. Once the ordinance was enacted, however, plaintiffs never applied for a variance or special use permit. Such an application may well have been fruitful, in light of what the district court characterized as "undisputed testimony that the planning commission does not insist on strict compliance with the regulations, but instead will permit some deficiencies in various requirements. . . ." *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986) ("The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other."); *cf. Herrington*, at 1497-98 (where testimony of county officials indicated that application for variance would have been futile,

plaintiff was relieved from *Kinzli*'s requirement that variance be sought).

Without seeking an authoritative decision by the City, Shelter Creek and the O'Hearns, and their lenders and insurers, erroneously assumed that Ordinance No. 1805 applied to bar conversion of the apartment complex to a stock cooperative. In fact, because plaintiffs never sought a special use permit, the City never applied the ordinance to their property.[3] The City reached no final and authoritative determination as to how the ordinance applied. Accordingly, plaintiff's claim that the ordinance is unconstitutional as applied is not ripe for adjudication.

Plaintiffs maintain, however, that a ruling by this court that their claim is not ripe, absent an application for a special use permit, would be inconsistent with the ruling of the California Supreme Court that plaintiffs need not seek such a permit prior to converting the apartment complex to a stock cooperative. *See Shelter Creek*, 34 Cal.3d at 736 n. 1, 669 P.2d at 949 n. 1, 195 Cal.Rptr. at 362 n. 1. This argument erroneously assumes

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[3] Plaintiffs' brief speaks in terms of both the "application" of the ordinance to plaintiffs' property and the City's "refusal to exempt" their property from application of the ordinance. The City's refusal to accede to plaintiff's request that the ordinance include, on its face, an exemption for plaintiffs' property does not constitute an "application" of the ordinance to plaintiffs' property. Application of the ordinance does not occur until the City rules on a request for a variance or a special use permit under the ordinance, an event that never occurred in this case.

that ripeness requirements under federal law must be consonant with state law permit requirements.

The California court held that because Ordinance No. 1805 cannot be applied to their property, plaintiffs need not seek or obtain a special use permit in order to convert their apartment complex to a stock cooperative. That holding was based on state law. As a matter of federal law, however, a federal court cannot entertain a challenge to application of a land use ordinance absent a final and authoritative decision by the appropriate administrative body. This federal requirement of ripeness cannot be altered or abrogated by a decision of a state court construing its own laws.

IV. CONCLUSION

This constitutional challenge to the application of Ordinance No. 1805 to the Shelter Creek property is not ripe for judicial adjudication. Accordingly, we VACATE the district court's judgment on the merits and REMAND with directions that the claim be dismissed.[4]

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[4] *See Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1457 (9th Cir. 1987) (vacating district court's decisions on merits where landowners' constitutional challenge to application of land use ordinance was not ripe for adjudication) (landowners' claims "should have been dismissed for lack of jurisdiction").

APPENDIX B

CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No. CV 82-2246-WDK Date August 4, 1986

Title Shelter Creek Development Corp, et al -v- City of Oxnard

DOCKET ENTRY

PRESENT:

HON. WILLIAM D. KELLER, JUDGE

Sara Wong	Loraine Daley
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
none present

ATTORNEYS PRESENT FOR DEFENDANTS:
none present

PROCEEDINGS: (IN CHAMBERS)

Having considered the submitted materials, the Court hereby adopts its Tentative Findings of Fact and Conclusions of Law, with the deletion of the phrase "generally at a profit" from paragraph 3 at page 2, line 3.

cc: counsel of record

Initials of Deputy Clerk SW

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHELTER CREEK DEVELOPMENT CORPORATION, a corporation, LEO A. O'HEARN and MARGARET E. O'HEARN, Plaintiffs, v. CITY OF OXNARD, Defendant.	CASE NO. CV 82-2246-WDK TENTATIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed May 29, 1986)

Pursuant to Federal Rule of Civil Procedure 52(a), the Court hereby makes the following Tentative Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Shelter Creek apartment complex (the "complex"), consisting of 216 units, was constructed in the City of Oxnard ("the City") in 1973.

2. Plaintiffs Leo A. O'Hearn and Margaret E. O'Hearn ("the O'Hearns") purchased the complex in January 1978.

3. At all times since the O'Hearns' purchase of the complex, it has been operated as apartment rental units, generally at a profit.

4. Following their purchase of the complex, the O'Hearns formed Shelter Creek Development Corporation in order to sell the complex to the corporation with the objective of converting the complex from apartment rental units to a stock cooperative form of ownership.

5. In August 1978, the O'Hearns applied for a public report from the California Department of Real Estate ("DRE") and paid the required fees in order to convert the complex into a stock cooperative. This report was issued on December 26, 1979.

6. In 1979, the City undertook to regulate the conversion of apartments to condominiums and stock cooperatives through a series of interim ordinances culminating with ordinance No. 1805, adopted April 1, 1980.

7. These measures responded, at least in part, to a concern that the City's stock of apartment rental units might be seriously depleted by conversion to proprietary ownership units.

8. The need for preservation of apartment rental units was highlighted by the transient nature of much of the City's population, which includes large concentrations of servicemen and agricultural laborers.

9. There was also a legitimate desire to upgrade the quality of proprietary housing units in the City, in the hope of encouraging an influx of more affluent residents and increasing the diversity of the community.

10. In September 1979, the California State Legislature enacted Senate Bill 823 which expressly included stock cooperatives within the definition of a "subdivision" under the Subdivision Map Act. Cal. Gov. Code. Section 66424. Stats. 1979, ch. 1192, Section 4691-92.

11. Senate Bill 823 contained a "grandfather clause" that exempted stock cooperative conversions from local control "under the provisions of the Subdivision Map

Act," if the application for a public report and required fees had been filed with the DRE prior to July 1, 1979.

12. The O'Hearns sought to have the City exempt the conversion of the project from local regulation pursuant to the grandfather clause of S.B. 823. However, they neither applied for a special use permit under Ordinance 1805, nor formally requested a variance.

13. The City took the position that it had power apart from the Subdivision Map Act to regulate the proposed conversion. Therefore, it refused to exempt the complex from the ordinance. This refusal effectively barred the O'Hearns from pursuing conversion of the complex to a stock cooperative form of ownership, as they were unable to obtain the necessary insurance and funding absent city acquiescence.

14. Ordinance 1805 required, *inter alia*, that units to be converted into stock cooperatives have seperate utility metering, and that they "substantially conform to any advisory standards for the construction of new community housing projects. . . ." Oxnard Ordinance 1805, Section 34-226(a)(4),(b). Therefore, the ordinance required that potential stock cooperative conversions substantially comply with City Resolution 7658, which sets out a wide range of physical standards for new residential condominiums.

15. The complex could not physically or economically comply with several of the physical requirements enumerated in Resolution 7658.

16. In June 1980, the O'Hearns filed an action in California Superior Court seeking a determination that

Ordinance 1805 was unconstitutional and that it was inapplicable to the complex because of the grandfather clause contained in S.B. 823. The trial court held that the grandfather clause did not exempt the complex from Ordinance 1805, but concluded that the ordinance was unconstitutional as applied to the plaintiffs' project. This ruling was affirmed by the California Court of Appeal, Second District. On October 13, 1983, the California Supreme Court held that the complex was exempted from the application of Ordinance 1805 by the grandfather clause contained in S.B. 823. *Shelter Creek Dev. Corp. v. City of Oxnard*, 33 Cal. 3d 733, 195 Cal. Rptr. 361, 669 P.2d 948 (1983). The Supreme Court expressly declined to reach the constitutionality of the ordinance. 33 Cal. 3d at 735.

17. On August 1, 1985, the California Supreme Court upheld the facial validity of Ordinance 1805 in *Griffin Development Co. v. City of Oxnard*, 39 Cal. 3d 259, 217 Cal. Rptr. 1, 703 P.2d 339 (1985).

18. Since the decision of the California Supreme Court in the *Shelter Creek* case, the City has not taken any action to prevent the O'Hearns from converting the complex to a stock cooperative. However, the O'Hearns maintain that the market has become unsuitable for such conversion.

19. The City has not permitted any other conversions of apartment rental units into condominiums or stock cooperatives since it began regulating such conversions in 1979.

20. In refusing to exempt the complex from Ordinance 1805 prior to the California Supreme Court's decision in October 1983, the City did not discriminate against the O'Hearns based on race, age, sex or other impermissible criteria.

21. To the extent that any of the foregoing are deemed to be Conclusions of Law, they shall be considered Conclusions of Law.

CONCLUSIONS OF LAW

1. The Court rejects the City's earlier position, now apparently conceded, that the plaintiffs did not have a cognizable property interest in converting the complex into a stock cooperative. *See, e.g., Kerley Industries, Inc. v. Pima County*, slip op. at 5 (9th Cir. April 3, 1986).

2. However, the O'Hearns did not exhaust their administrative remedies, and they have failed to demonstrate that pursuit of the standard procedures would have been futile in the circumstances of this case. "[I]t cannot be assumed from the city council's refusal to exempt plaintiffs' project that their application for either a permit or a variance from the conversion regulations would have been denied by the planning commission." *Shelter Creek*, 33 Cal. 3d at 739 (Bird, C.J., dissenting). The undisputed testimony that the planning commission does not insist on strict compliance with the regulations, but instead will permit some deficiencies in various requirements, highlights the importance of pursuing the available administrative remedies. "Where an ordinance is alleged to be unconstitutional *as applied* to a particular

property, administrative relief (in the form of an exception or a variance) must be sought before resort to the courts is permitted." *Id.* at 740 (emphasis in original) (citing cases).

3. Even if the O'Hearns had demonstrated futility sufficient to excuse their failure to exhaust their administrative remedies, the Court concludes that that Ordinance 1805 is valid both facially and as applied. Facially, there is no question that the ordinance is "reasonably related to legitimate governmental purposes," including maintainence of adequate rental housing stock and upgrading the quality of proprietary housing. *See Griffin Development Co. v. City of Oxnard*, 39 Cal. 3d 259, 217 Cal. Rptr. 1, 703, P.2d 339. Moreover, the individual physical requirements contained in the ordinance and Resolution 7658 are all rationally related to legitimate governmental purposes, ranging from conservation of energy to increasing safety and convenience in the housing units.

4. Similarly, the Court cannot conclude that the application of Ordinance 1805 to the complex was "arbitrary and unreasonable" or that it had "no substantial relation to the general welfare." *See, e.g., Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Scudder v. Town of Greendale*, 704 F.2d 999 (7th Cir. 1983); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981). In granting partial summary judgment for the City, the Court previously held that the City's interpretation of its police power as being independent of S.B. 823 in this matter was not arbitrary or unreasonable, despite the subsequent rejection of this position (over a vigorous dissent) by the California Supreme Court.

5. The Court also concludes that the application of the standards contained in Ordinance 1805 was not unconstitutional as applied, as they were reasonably related to the legitimate governmental concerns outlined above. While the Court might have reached a different result, it would not be unreasonable for the City to believe that, given the size of the complex, the removal of these apartment units from the market would have an adverse impact on the availability of rental housing, and that conversion without at least substantial compliance with the physical standards contained in the ordinance and resolutions would not improve the quality of proprietary housing in the city.

6. As for the plaintiffs' equal protection claim, "[a]bsent a suspect classification or the infringement of a fundamental right, neither of which are present here, the equal protection clause is offended only if the City's different treatment of [the developer] bears no rational relationship to a legitimate governmental purpose." *Parks v. Watson*, 719 F.2d 646, 654 (9th Cir. 1983). Here, the City could rationally have concluded that the need to maintain rental housing, coupled with the desire to improve the quality of proprietary housing units, dictated placing high standards for conversion. Many potential conversions would thereby be deterred, and only those projects that met the higher quality standards which the City was trying to promote would be allowed to change into a proprietary form of ownership.

7. In order to encourage the construction and maintenance of housing units as apartments, the City could reasonably have set lower standards for apartments than for proprietary units. The desire to maintain an adequate

supply of rental housing could reasonably have prompted the City to require apartments seeking to convert into proprietary ownership units to comply with more rigorous standards than required for newly constructed proprietary housing. Additionally, the City could reasonably have determined that greater housing diversity would be fostered by making the physical requirements of Resolution 7658 advisory, as opposed to mandatory, for the construction of new proprietary housing. Thus, the Court concludes that differentiation between apartments and stock cooperatives, and between apartments seeking to convert to proprietary units and new construction of proprietary units, are both rationally related to legitimate governmental purposes.

8. Finally, the Court concludes that there was no "intentional or purposeful discrimination" by the City in refusing to exempt the complex from Ordinance 1805. *See Scudder*, 704 F.2d at 1002-03. "[A] discriminatory purpose is not presumed, there must be a showing of 'clear and intentional discrimination.' " *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 88 L. Ed. 497 (1944), *quoted in Scudder*, 704 F.2d at 1003. Here, the circumstances that the City knew about the O'Hearns' plans and that Shelter Creek was, perhaps, the only project potentially exempted under Senate Bill 823 and subject to the City's regulations is not sufficient to infer discriminatory intent or purpose. While not determinative, the fact that the City has not allowed any other apartment complex to convert into a stock cooperative or condominiums strongly supports the absence such discrimination against the plaintiffs in this case.

9. To the extent that any of the foregoing are deemed to be Findings of Fact, they shall be considered Findings of Fact.

IT IS SO ORDERED.

DATED: MAY 29, 1986.

/s/ William D. Keller
William D. Keller
United States District Judge

APPENDIX C

34 Cal.3d 733; 195 Cal.Rptr. 361, 669 P.2d 948 [Oct. 1983]

[L.A. No. 31609. Oct. 13, 1983.]

SHELTER CREEK DEVELOPMENT CORPORATION et al., Plaintiffs and Appellants, v.
CITY OF OXNARD, et al., Defendants and Appellants.

* * *

COUNSEL

Drummy, Garrett, King & Harrison, Alan I. White, Charles W. Parret and John C. Murphy for Plaintiffs and Appellants.

Richard L. Johnson and Thomas L. Berkley as Amici Curiae on behalf of Plaintiffs and Appellants.

K.D. Lyders, City Attorney, for Defendants and Appellants.

Robert M. Myers, City Attorney (Santa Monica), Stephen Shane Stark, Assistant City Attorney, Jonathan S. Horne and Karl M. Manheim, Deputy City Attorneys, as Amici Curiae on behalf of Defendants and Appellants.

OPINION

MOSK, J. – Plaintiffs, the owners of a 216-unit apartment complex in the City of Oxnard, and a real estate developer who holds an option to purchase the property, seek to convert the structure to a stock cooperative form of ownership. The city has enacted an ordinance that provides a special use permit must be obtained to accomplish the conversion and sets forth certain physical

standards to which the structure should conform to qualify for a permit.

(1a) Plaintiffs claim that the ordinance is unconstitutional and, moreover, that it does not apply to their project because of a statute containing a grandfather clause excepting certain stock cooperative conversion projects from the requirements of local ordinances. We conclude that their exemption argument is meritorious. Therefore, we do not reach the constitutional issues raised by the parties.

A stock cooperative is defined in section 11003.2 of the Business and Professions Code as a corporation formed for the purpose of holding title to improved real property. The shareholders receive the right of exclusive occupancy of a portion of the property, and that right may only be transferred concurrently with the shares.

State law prior to 1979 provided, as it does presently, that shares in a stock cooperative could not be sold until a public report setting forth various matters pertaining to the property was obtained from the Department of Real Estate (Bus. & Prof. Code, §§ 11004.5; 11010; 11010.2), but stock cooperatives were not required to comply with the provisions of the Subdivision Map Act (Gov. Code, § 66410 et seq., Stats. 1977, ch. 234, § 3, pp. 1033-1034). The act vests the authority to control the design and improvement of subdivisions of five or more units in the legislative bodies of local agencies. (*Id.*, § 66411.) It requires that the local agency approve a subdivision map for all subdivisions as defined therein (*id.*, §§ 66426; 66458), and approval of the map depends upon a determination by the local body that the map is consistent

with the local entity's plans and ordinances (*id.*, §§ 66473; 66473.5; 66474.2). In September 1979, the Legislature amended section 66424 of the Government Code to include stock cooperatives within the definition of a "subdivision" under the Subdivision Map Act, so as to require stock cooperative projects to comply with the provisions of the act. (Stats. 1979, ch. 1192, § 1, pp. 4691-4692.) The amendment became effective on January 1, 1980.

The measure which amended section 66424 contained the grandfather clause relied on by plaintiffs. It provides in subdivision (b) of section 8 (hereafter section 8) that governmental agency regulation of stock cooperative conversions under the provisions of the Subdivision Map Act which was "exercised pursuant to a legislative enactment prior to January 1, 1980, shall not be invalidated by this section; provided that no such regulation enacted after July 1, 1979, shall affect a stock cooperative conversion if the application for that conversion's public report, including payment of an appropriate fee, was made prior to July 1, 1979." (Stats. 1979, ch. 1192, § 8, subd. (b), p. 4695.)

On April 1, 1980, the city adopted ordinance No. 1805, which requires that a special use permit be obtained for stock cooperative conversions, and sets forth certain conditions for the issuance of a permit. The measure was to take effect on May 1, 1980, and it provides that any project which had not received a special use permit as of March 6, 1980, must comply with the ordinance.

Plaintiffs applied for a public report from the Department of Real Estate on August 18, 1978, i.e., almost a year

prior to the July 1, 1979, date referred to in section 8, and they paid the required fee. However, they made no application to the city for the special use permit required by ordinance No. 1805.[1]

In June 1980, they filed a complaint for declaratory relief, seeking a determination that the ordinance is unconstitutional and that it is inapplicable to their project because of the grandfather clause in section 8. They made a motion for summary judgment on these grounds, and the parties entered into certain stipulations for the purpose of the motion. The trial court denied the motion deciding, inter alia, that section 8 does not exempt plaintiffs' project from local regulation. It declined to rule on the constitutionality of the ordinance because it deemed the issue to be outside the matters stipulated by the parties for the purpose of the motion. Thereafter, plaintiffs filed a second motion for summary judgment, challenging the constitutionality of the ordinance. This time, the trial court granted the motion, holding that the ordinance was unconstitutional as applied to plaintiffs' project; it enjoined the city from attempting to enforce the ordinance against plaintiffs.

(2) (See fn. 2.), (1b) On this appeal from the ensuing judgment,[2] the city challenges the jurisdiction of the trial

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[1] Plaintiffs were excused from making such an application because, as we shall conclude, they were exempted from the entire ordinance by operation of the grandfather clause of the statute.

[2] Plaintiffs filed a "cross appeal" from the trial court's denial of their first motion for summary judgment. (continued)

court to decide the constitutionality of the statute as applied to plaintiffs' property, and the sufficiency of the evidence to sustain the court's finding of unconstitutionality of the statute as applied. Plaintiffs oppose these contentions and urge, in addition, that they were not required to comply with the ordinance because of the grandfather clause in section 8.

As we have seen, section 8 provides that local regulation of stock cooperative conversions enacted after July 1, 1979, under the Subdivision Map Act would not affect conversions as to which an application for a public report from the Department of Real Estate had been made before July 1, 1979, and the application fee paid. Since plaintiffs had applied for the report and paid the fee in 1978, the exemption would appear applicable to them. However, claims the city, the exemption does not apply because by its terms it relates only to those local regulations passed after July 1, 1979, under the authority of the Subdivision Map Act. It asserts that ordinance No. 1805 was not enacted pursuant to that act but, rather, under the authority granted to local bodies by other state statutes (e.g., Gov. Code, § 65800 et seq.); ergo, the exemption does not apply to stock cooperative conversions within the scope of ordinance No. 1805.

This contention is without merit. The ordinance was enacted after January 1, 1980, which is the effective date

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This order is not appealable (Code Civ. Proc., § 904.1; *Shulze v. Schulze* (1953) 121 Cal.App.2d 75, 83 [262 P.2d 646]; *Nevada Constructors v. Mariposa etc. Dist.* (1952) 114 Cal.App.2d 816, 818 [251 P.2d 53]), and the appeal therefrom is dismissed.

of the amendment to section 66424 of the Government Code making stock cooperative conversions subject to the Subdivision Map Act. After that date, the city was required to apply the provisions of the act to all stock cooperative conversion projects unless the Legislature allowed an exemption. In these circumstances, it cannot be said that the adoption of the ordinance was not accomplished "under the provisions of the Subdivision Map Act." Assuming that the city had the authority from a source other than the act to regulate stock cooperative conversions (cf. *Norsco Enterprises v. City of Fremont* (1976) 54 Cal.App.3d 488, 496-497 [126 Cal.Rptr. 659]), the regulation of such conversions following the effective date of the amendment to section 66424 of the Government Code must necessarily also have been effected under the provisions of the act. Thus, the exemption set forth in section 8 applies to plaintiffs' project.[3]

The judgment is affirmed.

Richardson, J., Kaus, J., Broussard, J., and Grodin, J., concurred.

BIRD, C.J. – I respectfully dissent.

Today's majority opinion decides a case that the courts lack jurisdiction to hear. Plaintiffs have not

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[3] Before the adoption of ordinance No. 1805 in April 1980, the city had enacted temporary ordinances which expired by their own terms, requiring that a special use permit be obtained as a condition to the conversion of a structure to a stock cooperative form of ownership. The city does not claim that these expired ordinances are relevant to plaintiffs' project.

exhausted their administrative remedies. In addition, the holding reached by the majority improperly undermines the city's attempt to resolve its local housing problems.

I.

By this action for declaratory relief, plaintiffs are seeking to be relieved from the requirements of the city conversion ordinance. However, the law is well settled that the exhaustion of administrative remedies is a jurisdictional prerequisite to obtaining judicial relief. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293 [109 P.2d 942, 132 A.L.R. 715]; *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 88 [143 Cal.Rptr. 441].) This doctrine is not simply a matter of judicial discretion, but a fundamental rule of law. (*Mountain View Chamber of Commerce, supra,* 77 Cal.App.3d at p. 88).

In this case, plaintiffs have never applied for a special use permit pursuant to the city ordinance nor sought a variance from the conversion regulations. Inexplicably, this jurisdictional problem is not even addressed by the majority opinion. Yet, unless plaintiffs can establish as a matter of law that they are excused from the exhaustion requirement, this case is not properly before the courts.[1]

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[1] Since the failure to exhaust administrative remedies deprives a court of jurisdiction to hear the case, such a defect cannot be waived by a party's failure to raise it below. (*Jacobs v. Retail Clerks Union, Local 1222* (1975) 49 Cal.App.3d 959, 963 [123 Cal.Rptr. 309].)

Plaintiffs contend that their failure to exhaust administrative remedies should be excused because it would have been futile to pursue such remedies. However, "[f]utility is a narrow exception" to the exhaustion doctrine. (*Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 683 [172 Cal.Rptr. 844].) Plaintiffs must be able to "positively state what the administrative agency's decision in [their] particular case would be." (*Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834 [112 Cal.Rptr. 761]; *Gantner & Mattern Co. v. California E. Com.* (1941) 17 Cal.2d 314, 318 [109 P.2d 932]; see also *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) *ante* pp. 412, 418 [194 Cal.Rptr. 357, 668 P.2d 664].)

The record indicates that prior to the enactment of this ordinance plaintiffs sought to have their project expressly exempted from the conversion regulations. This request was denied by the city council. However, it does not necessarily follow that a legislative body's refusal to grant a specific exemption from the terms of a general zoning ordinance means that the agency administering the regulations will not permit development of the project.[2] It may well be impossible for the legislative body to determine "the varied factual situations to which the ordinance is not applicable because of . . . special considerations." (*Metcalf v. County of Los Angeles* (1944) 24 Cal.2d 267, 271 [148 P.2d 645].) This function properly rests with the administrative body on a case-by-case

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[2] Unlike *Ogo Associates, supra*, 37 Cal.App.3d 830, 834, there is no evidence in this case that the city ordinance was enacted for the specific purpose of precluding plaintiffs' project.

analysis. Thus, it cannot be assumed from the city council's refusal to exempt plaintiffs' project that their application for either a permit or a variance from the conversion regulations would have been denied by the planning commission.

Plaintiffs also rely on the fact that their project does not fully comply with the design requirements of the conversion ordinance. However, no evidence was introduced indicating the extent of such noncompliance. Many of the design standards contained in the ordinance were advisory and required only substantial conformity.

Thus, I cannot find as a matter of law that it would have been futile for plaintiffs to have exhausted their administrative remedies. The evidence does not establish that, after consideration of the individual circumstances of plaintiffs' project, the planning commission would have refused to permit the conversion.

The majority opinion does not address plaintiffs' futility argument. Instead, it merely concludes in a footnote that plaintiffs were excused from applying for a special use permit "because . . . they were exempted from the entire ordinance by operation of the grandfather clause of the statute." (Maj. opn., *ante*, at p. 736, fn. 1.) In my view, however, plaintiffs were not entitled to apply to a court for judicial construction of the grandfather clause without first seeking administrative relief which might have made judicial action unnecessary.

The only way plaintiffs would be "exempted" from the operation of the local ordinance is if the ordinance is found unconstitutional because it is preempted by state

law. (Cal. Const., art. XI, § 7.)[3] And, the only way plaintiffs may properly challenge the ordinance's constitutionality, without first exhausting the administrative remedies it provides, is to bring an action to determine whether the ordinance is constitutional *on its face*. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251 [115 Cal.Rptr. 497, 524 P.2d 1281].)

The majority apparently accepi plaintiffs' claim that their challenge is to the *facial* validity of the ordinance. Yet, plaintiffs do not contend that the permit requirement for conversion of apartments to stock cooperatives is invalid generally. They object only to its application to certain conversions – i.e., those for which an application for a public report was made prior to July 1, 1979.

Where an ordinance is alleged to be unconstitutional *as applied* to a particular property, administrative relief (in the form of an exception or a variance) must be sought before resort to the courts is permitted. (*Metcalf v. County of Los Angeles, supra,* 24 Cal.2d at p. 270; *Igna v. City of Baldwin Park* (1970) 9 Cal.App.3d 909, 914-15 [88 Cal.Rptr. 581]; see also *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 249-250 [146 Cal.Rptr. 428].) No such administrative relief was sought in the present case.

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[3] Article XI, section 7 provides that "[a] county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."

Since the exhaustion doctrine has not been complied with, this court lacks the jurisdiction to hear plaintiffs' case.

II.

I have serious reservations about the majority's conclusion that the conversion ordinance is inapplicable to plaintiffs' development, because of the grandfather clause contained in the legislation amending the Subdivision Map Act. (Stats. 1979, ch. 1192 § 8, p. 4695). By its terms, the grandfather clause only pertains to the regulation of stock cooperative conversions "under the provisions of the Subdivision Map Act." The conversion ordinance, on the other hand, was purportedly enacted by the city pursuant to its zoning powers. (See Gov. Code, § 65800 et seq.)

The majority's holding effectively gives to a developer, whose project satisfies the prerequisites for application of the grandfather clause, free rein to evade all local regulation of stock cooperative conversions. Such a drastic result would be justified only if either of two propositions were correct: (1) the 1979 amendment of the act to include stock cooperative conversions within the definition of a "subdivision" preempted regulation of such conversions pursuant to a local government's zoning powers; or (2) local governments have no power apart from the act to regulate the conversion of rental apartments into stock cooperatives. Neither of these questions is even considered by the majority. As a result, their

opinion fails to provide a sound basis for reaching their holding.[4]

The issues have not been addressed by the majority. Nor have they yet been definitively resolved by the courts. However, a review of the legislative scheme indicates that the act was not intended to occupy the entire field of stock cooperative regulation. The act is located in the second division of title 7 of the Government Code. (See Gov. Code § 66410 et seq.) That title is broadly labeled "Planning and Land Use," and comprehensively treats many aspects of land use regulation. (See Gov. Code, § 65000 et seq.)

The Subdivision Map Act merely focuses on one particular design control mechanism – the mapping process. The developer is required by the act to submit a

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[4] The sole rationale offered in support of the majority's holding is that, "[a]ssuming that the city had the authority from a source other than the act to regulate stock cooperative conversions [citation], the regulation of such conversions following the effective date of the amendment to section 66424 of the Government Code must necessarily also have been effected under the provisions of the act. Thus, the exemption set forth in [the legislation amending the act] applies to plaintiffs' project." (Maj. opn., *ante*, at p. 738, fn. omitted.)

This reasoning is illogical. Consider a city that has two independent sources of authority – e.g., state and federal law – for regulating a particular activity. If the federal law contains a proviso exempting the activity from regulation under its provisions in certain situations, does it necessarily follow that when the federal exemption applies, the city is precluded from relying on state authority to regulate that activity? The clear answer is no.

map of his subdivision project to the local government for approval. (See Gov. Code, §§ 66426, 66452, 66457.) Approval of the map is based on whether the project conforms with the locality's general and specific land use plans. (See Gov. Code, §§ 66473.5, 66474.) Unlike the ordinance adopted by the city in this case, the act does not establish physical design standards for subdivisions.

In addition, the act itself seems to expressly disclaim any intent to preempt local regulation. Government Code section 66427 addresses certain mapping procedures and requirements for "a condominium project, a community apartment project, or . . . the conversion of five or more existing dwelling units to a stock cooperative." The section contains the following disclaimer: "Nothing herein shall be deemed to limit the power of the legislative body to regulate the design or location of buildings in such a project by or pursuant to local ordinances."

That a locality has authority apart from the act to regulate stock cooperative conversions also seems beyond dispute. "Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7." (*Bounds v. City of Glendale* (1980) 113 Cal.App.3d 875, 879 [170 Cal.Rptr. 342], fn. omitted.) This section confers upon all cities and counties the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) More specifically, subdivisions (a) and (c) of Government Code section 65850 permit city and county governments to regulate by ordinance the use and design of buildings.

Thus, the grandfather clause exempting the conversion of certain stock cooperatives from regulation "under the provisions of the Subdivision Map Act" does not protect plaintiffs' project. Plaintiffs must comply with the conversion ordinance enacted pursuant to the city's police powers. The contrary holding of this court improperly interferes with the city's efforts to ensure adequate housing for all its residents.

Reynoso, J., concurred.

APPENDIX D

ORDINANCE NO. 1755

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OXNARD ESTABLISHING A TEMPORARY MORATORIUM ON THE CONVERSION OF APARTMENTS TO RESIDENTIAL STOCK COOPERATIVES AND COMMUNITY APARTMENTS.

WHEREAS, the City Council on March 14, 1978 in Ordinance No. 1686, imposed a moratorium on the conversion of apartments which are or ever have been occupied by tenants to condominiums, and extended said moratorium on July 11, 1978 and March 6, 1979, in Ordinance Nos. 1701 and 1746 respectively, and

WHEREAS, the same substantive reasons for justifying the imposition of a condominium conversion moratorium applies to residential stock cooperative and community apartment conversions; and

WHEREAS, regulations governing residential stock cooperatives and community apartments are currently being prepared by staff.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OXNARD DOES ORDAIN AS FOLLOWS:

PART 1. During the period of the moratorium established hereunder, no applications for the conversion of apartments or multiple dwellings which are or ever have been occupied as rental units by tenants, to residential stock cooperatives and community apartments, may be accepted.

PART 2. Within 15 days after its passage, the City Clerk shall cause this ordinance to be published one time

in a newspaper of general circulation published and circulated in the City, and shall, within 30 days, mail a copy of this ordinance to the Ventura County Assessor.

PART 3. This ordinance is adopted pursuant to Section 65858 of the Government Code as an urgency measure to protect the public safety, health, and welfare by prohibiting uses which may be in conflict with a contemplated zoning proposal which the legislative body, Planning Commission or Planning Department is considering or studying or intends to study within a reasonable time. This ordinance was introduced and adopted on May 8, 1979 by a vote of at least four-fifths of the members of the City Council, to be effective immediately. This ordinance shall be of no further force and effect after four months from the date of adoption thereof unless extended as provided in Section 65858.

Passed and adopted this 8th day of May, 1979, by the following vote:

AYES: Councilmen Miller, Takasugi, Kato, Lopez.

NOES: None

ABSENT: Councilman Maxwell.

/s/ Tsujio Kato
Dr. Tsujio Kato, Mayor

ATTEST: /s/ Mabi Covarrubias
Mabi Covarrubias
Deputy City Clerk

APPENDIX E

ORDINANCE NO. 1774

INTERIM ORDINANCE ESTABLISHING A TEMPORARY MORATORIUM ON THE CONVERSION OF APARTMENTS TO RESIDENTIAL STOCK COOPERATIVES AND COMMUNITY APARTMENTS.

WHEREAS, on May 8, 1979, Ordinance No. 1755 (as amended by Ordinance No. 1757) was adopted as an urgency measure to impose a moratorium on the conversion of apartments or multiple dwellings to residential stock cooperatives and community apartments, and

WHEREAS, it is necessary to extend the urgency ordinance while the regulations governing residential stock cooperatives and community apartments are currently being prepared by staff, and

WHEREAS, pursuant to section 65858 of the Government Code notice was given as required by section 85856 of the intention to extend the urgency ordinance for a period of eight months,

NOW, THEREFORE, the City Council of the City of Oxnard does ordain as follows:

1. During the period of the moratorium established hereunder, no applications for the conversion of apartments or multiple dwellings to residential stock cooperatives and community apartments, may be accepted.

2. Within 15 days after its passage, the City Clerk shall cause this ordinance to be published one time in a newspaper of general circulation and circulated in the City, and shall, within 30 days, mail a copy of this ordinance to the Ventura County Assessor.

3. This ordinance is adopted pursuant to Section 65858 of the Government Code "as an urgency measure to protect the public safety, health, and welfare by prohibiting uses which may be in conflict with a contemplated zoning proposal which the legislative body, Planning Commission or Planning Department is considering or studying or intends to study within a reasonable time." This ordinance was introduced and adopted on September 4, 1979 by a vote of at least four-fifths of the members of the City Council, to be effective immediately. This ordinance shall be of no further force and effect after eight months from the date of adoption thereof unless extended as provided in Section 65858.

Passed and adopted this 4th day of September, 1979, by the following vote:

AYES: Councilmen Maxwell, Takasugi, Kato, Lopez.

NOES: Councilman Miller.

ABSENT: None

/s/ Tsujio Kato
Dr. Tsujio Kato, Mayor

ATTEST:
/s/ Mabi Covarrubias
Mabi Covarrubias
Deputy City Clerk

CITY ATTORNEY APPROVAL
as to form and legal sufficiency

by /s/ Mark S. Sellers

APPENDIX F

CITY OF OXNARD
ORDINANCE NO. 1805

ORDINANCE ESTABLISHING CONDOMINIUM, STOCK COOPERATIVE, COMMUNITY APARTMENTS ETC., CONVERSION PROCEDURES AND REQUIREMENTS.

The City Council of the City of Oxnard does ordain as follows:

PART 1. Article IX is hereby added to Chapter 34 of the Code of the City of Oxnard to read as follows:

ARTICLE IX. COMMUNITY HOUSING CONVERSIONS

Sec. 34-220. Purpose.

The intent and purpose of this section is to regulate the conversion of existing, occupied apartment housing into condominiums, townhouse condominiums, residential stock cooperatives, or community apartments. The City finds that such ownership patterns may have substantial effects and that regulation is necessary to implement the policies set forth in the Housing Element of the Oxnard General Plan to provide adequate housing opportunities for all economic segments of the community, to mitigate adverse impacts upon schools and other public facilities, to provide for reasonable notice to displaced tenants and provide for adequate maintenance of private residential properties to insure safety and maximize the quality of the City's living environments.

Sec. 34-221. Special Use Permit Required.

No existing residential apartment unit shall be converted for sale, transfer, or conveyance as a condominium, townhouse condominium, stock cooperative, or community apartment, collectively referred to in this article as a community housing project, without a special use permit, and where applicable, an approved subdivision map.

Sec. 34-222. Requirements for Filing.

An application for conversion of an apartment shall include a tentative subdivision map, a development plan consisting of all materials normally required for a Special Use Permit, and the following information in a form established by the Planning Director:

(a) Physical Elements Report. In order to insure that the units offered for sale conform to a reasonable level of soundness and repair, a report on the physical elements of all structures and facilities shall be submitted with the tentative subdivision or parcel map, and special use permit. The report shall include, but not be limited to, the following:

(1) A report detailing the structural condition of all elements of the property including foundations, electrical, plumbing, utilities, walls, ceilings, windows, recreational facilities, sound transmission of each building, mechanical equipment, parking facilities, and appliances.

Regarding each such element, the report shall state, to the best knowledge or estimate of the applicant, when such element was built; the condition of each element; when such element was replaced; the approximate date upon which such element will require replacement; the cost of replacing such element; and any variation of the physical condition of such element from the current zoning and from the City Housing Code and City Building Code in effect on the date that the last building permit was issued for the subject structure. The report shall identify any defective or unsafe elements and set forth the proposed corrective measures to be employed, and shall be prepared and signed by a licensed engineer or registered architect.

(2) A report from a licensed structural pest control operator, approved by the City, on each structure and each unit within the structure.

(3) A statement of repairs and improvements to be made by the subdivider necessary to refurbish and restore the project to achieve good appearance and safety.

(b) Additional items to be submitted to the City:

(1) Any declaration of Covenants, Conditions and Restrictions and/or organizational documents which would apply to any owners of the units within the community housing

project. The declaration or organizational documents shall include, but not be limited to, proecedure or requirements for conveyance of units; the assignment of parking; an agreement for common area maintenance; including facilities and landscaping; an estimate of any initial assessment fees anticipated for such maintenance of all vehicular access areas within the project; and indication of appropriate resonsibilities for maintenance of all utility lines and services for each unit.

(2) Specific information concerning the characteristics of the project, including but not limited to the following:

(a) Square footage and number of rooms in each unit;

(b) Names and addresses of all tenants.

(3) Proof of service for each tenant of the notice to convert as specified in section 34-227.

(4) Any other information which, in the opinion of the Planning Director, will assist in determining whether the proposed project will be consistent with the purposes of this article.

Sec. 34-223. Completed Filing

Before a filing shall be deemed complete, the Physical Elements Report and other documents shall be in a form sufficient to allow review of the special use permit and tentative map.

Sec. 34-224. Copy to Buyers.

Prior to the execution of any agreement to purchase a unit stock, or exclusive right to lease in the community housing project, the subdivider shall provide each purchaser with a copy of all reports (in their final, acceptable form). The developer shall provide the purchaser with sufficient time to review such reports. Copies of the reports shall be made available at all times at the sales office.

Sec. 34-225. Hearing

Prior to any tentative subdivision map and/or special use permit approval of a conversion, the Planning Commission shall hold a noticed public hearing at which both the tentative map and special use permit shall be considered. In addition to notice requirements of section 34-152.1, a ten day notice shall be given by mail to the present tenants of the proposed conversion building.

Sec. 34-226. Physical Standards for Conversions.

Adequate Physical Condition. To achieve the purpose of this article, the Planning Commission shall require that all conversions conform to the Oxnard City Code in effect at the time of tentative map approval, except as otherwise provided herein. No apartment building which is a non-conforming use or a non-conforming structure because of parking, setback, height, interior yard space, and other zoning ordinance standards, shall be eligible for conversion.

All provisions of the City Code must be met and nonconformity corrected prior to the approval of the final map, unless adequate security is provided, as approved by the

City Attorney, to assure completion of such corrective work prior to the closing of any escrow of any unit in the community housing project.

(a) *Mandatory Physical Standards.* The Planning Commission shall require conformance with the standards of this section in approving the special use permit.

(1) *Building Regulations.* Except as herein provided, the project shall conform to the applicable standards of the City Housing Code, be in compliance with the City Building Code, Plumbing Code, Mechanical Code, and Electric Code as set forth in Chapter 9, of the City Code in effect on the date that the last building permit was issued for the subject structure or structures prior to the conversion application.

(2) *Fire Prevention.*

(a) *Smoke Detectors.* Each living unit shall be provided with approved detectors of the products of combustion other than heat, conforming to the latest U.B.C. standards, mounted on the ceiling or wall at a point centrally located in the corridor or area giving access to rooms used for sleeping purposes.

(b) *Maintenance of Fire Protection Systems.* All fire hydrants, fire alarm systems, portable fire extinguishers, and other fire protective appliances shall be

maintained in an operable condition at all times.

(c) *Maintenance of Emergency Vehicle Access/Fire Lanes.* All emergency vehicle access and established fire lanes shall be maintained.

(3) *Sound Transmission.*

(a) *Shock Mounting of Mechanical Equipment.* All permanent mechanical equipment, such as motors, compressors, pumps, and compactors, which is determined by the Building and Safety Administration to be a source of structural vibration of structure-borne noise shall be shock mounted with inertia blocks or bases and/or vibration isulators in a manner approved by the Building Administration.

(b) *Noise Standards.* The structure shall conform to all interior and exterior sound transmission standards of Chapter 35 (Appendix) of the Uniform Building Code.

(4) *Utility Metering.* Each dwelling unit shall be separately metered for gas, water, and electricity.

(5) *Landscape Maintenance.* All landscaping shall be restored as necessary and

maintained to achieve a good appearance and high quality.

(6) *Condition of Equipment and Appliances.* The developer shall provide written certification and 90 day warranty to the buyer of each unit at the close of escrow that any dishwashers, garbage disposals, stoves, refrigerators, hot water tanks, and air conditioners that are provided are in operable working condition as of the close of escrow. At such time as the Homeowner's Association takes over management of the development, the developer shall provide written certification and 90 day warranty to the Association that any pool and pool equipment (filters, pumps, chlorinator) and any appliances and mechanical equipment to be owned in common by the Association is in operable working condition.

(7) *Refurbishing and Restoration.* All main buildings, structures, fences, patio enclosures, carports, accessory buildings, sidewalks, driveways, landscaped areas and additional elements as required by the Planning Commission shall be refurbished and restored as necessary to achieve a good appearance, high quality, and high degree of safety.

(b) *Advisory Physical Standards.*

In addition to the above, the proposed community housing project shall meet any mandatory

development standards and shall substantially conform to any advisory standards for the construction of new community housing projects, which standards have been adopted by the City Council and are in effect at the time of review.

Sec. 34-227. Tenant Provisions.

(a) *Notice of Intent.* Prior to filing the application for aproval of a tentative map, the subdivider shall give a written Notice of Intent to Convert to each tenant and shall furnish proof of service of such notice in the application. The form of the notice shall be as approved by the Planning Department and shall contain not less than the following:

(1) Name and address of current owner;

(2) Name and address of the proposed subdivider;

(3) Approximate date on which the conversion is to be completed;

(4) Approximate date on which the unit is to be vacated by nonpurchasing tenants;

(5) A clear and full statement as to the tenant's:

(i) right to purchase, including but not limited to, period of time in which exerciseable, estimated price range, method of exercising right;

(ii) right of at least 120 day notification to vacate;

(iii) right of termination of the lease;

(6) Other necessary information which may be required for an adequate and fair disclosure.

(b) *Tenant's Right to Purchase.* As provided in Government Code Section 66427.1(b), any present tenant or tenants of any unit shall be given a non-transferable right of first refusal to purchase the unit occupied at a price no greater than the price offered to the general public. The right of first refusal shall extend for at least 60 days from the date of issuance of the Subdivision Public Report or commencement of sales, whichever date is later.

(c) *Vacation of Units.* In addition to any legally required Notice to Terminate Lease, each non-purchasing tenant, not in default under the obligations of the rental agreement or lease under which he occupies his unit, shall be given 120 day written notice which provides a specific date for vacating his unit, and by which he must find substitute housing for relocation. The notified vacation date shall be at least 120 days from the filing date of the final subdivision map or parcel map.

(d) *Notice to New Tenants.* After submittal of the Tentative Map, any prospective tenants shall be notified in writing of the intent to convert prior to leasing or renting any unit.

Sec. 34-228. Effect Upon Low- and Moderate-Income Housing Supply.

In reviewing requests for conversion, the Planning Commission shall consider the following:

(a) Whether or not the amount and impact of the displacement of tenants caused by the conversion would be detrimental to the health, safety, or general welfare of the community;

(b) The role that the apartment structure plays in the existing housing rental market. Particular emphasis will be placed on the evaluation of the City's rental market to determine if the existing apartment complex is serving low-and moderate-income households. Standard definitions of low- and moderate- income and low- and moderate-income rents used by the federal and state governments will be used in the evaluation.

Sec. 34-229. Findings.

The Planning Commission shall not approve an application for condominium conversion unless they find that:

(a) All submission and procedure provisions of this article are met;

(b) The proposed conversion is consistent with the General Plan;

(c) The proposed conversion will conform to the City Code in effect at the time of tentative map approval, except as otherwise provided in this article;

(d) The overall design and physical condition of the condominium conversion substantially meets the City's design criteria to achieve a good appearance, high quality, and high degree of safety;

(e) The proposed conversion will not displace a significant percentage of low- and moderate-income or senior citizen tenants, and will not delete a significant number of low- and moderate-income rental units from the City's housing stock;

(f) The project as approved or conditionally approved will meet all mandatory development standards and will substantially comply with the adopted advisory standards for new condominium construction, which standards are in effect at the time of approval; and

(g) Each dwelling unit provides a commonly accepted expectation safety, convenience and amenities for owner-occupied residences.

PART 2. Applicability.

This ordinance shall apply to any proposed apartment to community housing project conversion which, as of March 6, 1980, had not been granted a special use permit.

PART 3. Severability.

If any portion, provision, clause, sentence, or paragraph of this ordinance, or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the other provisions of this ordinance which can be given affect without the invalid

provision or application, and, to this end, the provisions of this ordinance are hereby declared to be severable.

PART 4. The City Attorney was designated to prepare a summary of this ordinance which summary was published at least five days prior to its adoption. Within 15 days after adoption of this ordinance the City Clerk shall cause such summary to be published one time in a newspaper of general circulation, published and circulated in the City. The City Clerk shall also post in the office of the City Clerk a certified copy of the full text of this ordinance along with the names of those City Council members voting for and against the ordinance.

PART 5. This ordinance was introduced for first reading on March 25, 1980 and passed on April 1, 1980 by the following roll call vote and shall take effect 30 days after final passage:

AYES: Councilmen Takasugi, Kato, and Lopez

NOES: Councilmen Miller and Maxwell

ABSENT: None

/s/ Nao Takasugi
Nao Takasugi
Mayor Pro Tem

ATTEST:

/s/ Lillian E. Adkins
Lillian E. Adkins
Acting Deputy City Clerk

APPROVED AS TO FORM:

/s/ Mark G. Sellers
Mark G. Sellers

APPENDIX G

Oxnard City Council
Regular Meeting
March 25, 1980

* * *

ORD. NO. 1805, EST. CONDO., STOCK COOP., COMM. APTS., ETC., CONVERSION PROCEDURES & REQUIREMENTS, FIRST READING F722

Mayor Pro Tem Takasugi opened the continued public hearing to consider an ordinance amendment to Chapter 34 of the Oxnard City Code to add a new section to establish standards for the regulation of the conversion of apartment housing into condominiums, townhouse condominiums, residential stock cooperatives or community apartments. The Deputy City Clerk reported no written communications. The Senior Planner reviewed Sections 34-226 and 34-227 concerning the physical standards for conversions and tenant provisions in the proposed ordinance drated on March 6, 1980, recommended by the Planning Commission. The Planning Director summarized his memorandum dated March 20, 1980, regarding Section 34-222 relative to requirements for filing and suggested Section 34-222(A)(1) be modified. The City Attorney recommended Section 34-222(A)(1) read, " . . . The report shall identify any defective or unsafe elements and set forth the proposed corrective measures to be employed, and shall be prepared and signed by a licensed engineer or registered architect." The City Attorney also recommended the last line of Section 34-2221 read, " . . . and where applicable, an approved subdivision map." Mr. Allan White of Drummy, Garrett, King &

Harrison, 4041 McArthur Boulevard – Ste. 250, Newport Beach, representing Shelter Creek Apartments, appeared to state the proposed ordinance was invalid. Mr. White referred to Senate Bill 823. Mr. White made reference to court cases in which he was involved relating to this subject. Mr. White indicated there was a grandfather clause to indicate conversion projects with an application on file with the Department of Real Estate (DRE) prior to July 1, 1979, should not be affected. Mr. White pointed out the proposed ordinance did not have a provision to address the grandfather clause. Mr. White noted the City's police power was limited and could not conflict with any State legislation. Mr. White told Council that to act on the proposed ordinance in the present form would be contrary to State law. Mr. White mentioned there were enough provisions in the Subdivision Map Act to allow the City to accomplish what it was attempting to do through the special use permit process. The City Attorney advised Council Mr. White's claim was somewhat over stated. He informed Council the proposed ordinance was legally supportive. He told Council it would be their decision to recognize or not recognize the grandfather clause. He stated there were some court cases on the subject which did not refer to the special use permit process. Mr. White told Council they would be satisfied if the grandfather clause were recognized with respect to SB 823 in the proposed ordinance. The Planning Director stated it was unknown how many reports were on file with the DRE prior to July 1, 1979. He indicated the grandfather clause would be a special privilege. Mr. Hans Lange, 1761 Fisher Drive, resident manager of Shelter Creek Apartments, appeared to give a history of the

complex as to the number of apartments, type of units, resident turnover, and the facilities available. Mr. Lange indicated he believed there was no difference between the residential status of tenants of apartments and stock cooperatives except a change of ownership. Mr. Lange mentioned there was much support from the present apartment tenants for conversion. Mr. Lange noted there had been no opposition after notice was given to residents. Mr. Lange explained the measures and efforts undertaken in meeting requirements from conversion of the apartment complex. Mrs. Tila Estrada, 511 South C Street, appeared to present and refer to a report from the California Association of Realtors dated June 19, 1979, concerning condominium and cooperative conversions. Mr. Ross appeared in favor of converting the Shelter Creek Apartments, and he indicated his interest to buy there. Councilman Maxwell moved the public hearing be closed. Councilman Miller seconded – motion carried unanimously. The City Attorney informed Council reference to the grandfather clause could be added in Part regarding applicability. He advised Council there were one or two projects which would be affected by the grandfather clause. Councilman Miller moved Ordinance No. 1805, establishing condominium, stock cooperative, community apartments, etc., conversion procedures and requirements, be read by title only and that further reading of the body of the ordinance be waived. Councilman Maxwell seconded – motion carried unanimously. Councilman Miller offered Ordinance No. 1805, for first reading, with the inclusion of a grandfather clause and the modifications to Sections 34-222(A)(1) and 34-221 as recommended by the City Attorney. Councilman Maxwell

seconded – motion failed by the following vote: Ayes: Councilmen Maxwell and Miller. Noes: Councilmen Takasugi, Kato, and Lopez. Absent: None. Councilman Kato offered *Ordinance No. 1805,* for first reading, with the modifications to Sections 34-222(A)(1) and 34-221 as recommended by the City Attorney. Councilman Lopez seconded – motion carried by the following vote: Ayes: Councilmen Kato, Lopez, and Takasugi. Noes: Councilmen Maxwell and Miller. Absent: None.

RECESS

At 9:40 p.m., Council recessed. At 9:45 p.m., Council reconvened.

CITY ATTY. INSTRUCTED TO FURTHER EVALUATE ISSUES OF ORD. NO. 1805, RELATE COUNCIL'S CONCERNS TO LEGISLATURE & PREPARE RPT. & RECOMM. F722

Councilman Kato moved to instruct the City Attorney to further evaluate the issues of Ordinance No. 1805, relate Council's concerns to the legislature, and prepare a report and recommendation. Councilman Maxwell seconded – motion carried unanimously.

* * *

APPENDIX H

Oxnard City Council
Regular Meeting
April 1, 1980

* * *

ORD. NO. 1805 ESTABLISHING CONDOMINIUM, STOCK COOPERATIVE, COMM. APTS.; ACTION DEFERRED UNTIL LATER IN SESSION F722

The City Attorney presented Ordinance No. 1805, establishing condominium stock cooperative, community apartments, etc., conversion procedures and requirements, for second reading. The City Attorney told Council a request had been received from the President of Shelter Creek Development Company that this development be exempted from the ordinance, and the same request had been made on the first reading of the ordinance. The City Attorney reviewed the procedures which would be required to allow a special circumstances exemption or an amendment. Mr. Moss Warren, 4200 South Harbor Boulevard, appeared to inquire whether or not the Ordinance, if passed, would affect apartment structures which are presently located on land leased from the County of Ventura, particularly at the Channel Islands, although the land is within the City boundaries. Mr. Warren stated that previously the City of Oxnard did allow the County to regulate construction and operation of lease hold properties at Channel Islands Harbor. The City Attorney indicated there had been a prior request for an opinion of whether the City had jurisdiction over that kind of property and if it was that property, it was his

opinion at that time that the City did not have jurisdiction because of the problem created by the County owner. The City Attorney explained the legal principal reflected in court decisions. Council concurred to defer this item until all members of Council were present.

* * *

ORD. NO. 1805, ESTABLISHING CONDOMINIUM, STOCK COOPERATIVE, COMM. APTS.; SECOND READING & ADOPTION F722

The City Attorney recapped the earlier discussion regarding Ordinance No. 1805. Councilman Lopez moved that the ordinance be read by title only and that further reading of the body of the ordinance be waived. Councilman Kato seconded – motion carried unanimously. Councilman Lopez offered Ordinance No. 1805 establishing condominium, stock cooperative, community apartments, for second reading and adoption. Councilman Kato seconded – motion carried by the following vote: Ayes: Councilmen Takasugi, Kato, and Lopez. Noes: Councilmen Miller and Maxwell. Absent: None.

* * *

APPENDIX I

Shelter Creek
Development Corporation
April 16, 1980

Oxnard City Council
City Hall
305 West Third Street
Oxnard, California 93030

Re: Waiver Request for Ordinances No. 1774, 1775 and 1805.

Dear Council members:

It is hereby requested that Shelter Creek Apartments be exempted from the above ordinances under authority of Senate Bill 823, effective January 1, 1980, as Chapter 1192, Statutes of 1979.

Senate Bill 823 authorizes local municipalities to regulate stock cooperative conversions as long as the ordinance exempts from regulation those stock cooperative conversions where an application for a subdivision public report was filed with the Department of Real Estate (DRE) prior to July 1, 1979.

The attached letter from DRE evidences the requisite filing effective September 14, 1978.

As discussed in prior hearings and memorandums the tenants at Shelter Creek have expressed no opposition whatsoever to this conversion and on the contrary are delighted with the opportunity for home ownership. Further, as your own records reflect, Shelter Creek and possibly one other 13 unit apartment complex are the only conversions eligible for exemption under SB 823.

Very truly yours,
/s/ H. Lange
Hans Lange, President

cc: Alan White, Esq.
Drummy, Garrett & King

VAN NUYS OFFICE
205 VAN NUYS LAW BUILDING
14328 VICTORY BOULEVARD
VAN NUYS, CA 91401
(213) 781-3079

OXNARD OFFICE
3650 KETCH AVENUE
OXNARD, CA 93030
(805) 487-6400

APPENDIX J

SEAL

CITY OF OXNARD
CALIFORNIA
April 23, 1980

OFFICE OF THE
CITY CLERK
305 W. THIRD STREET
486-4311, EXT. 583

Shelter Creek Development Corporation
3650 Ketch Avenue
Oxnard, Ca. 93030

ATTENTION Hans Lange, President

Gentlemen:

The following is from the minutes of the Oxnard City Council meeting of April 22, 1980:

> Letter from the President, Shelter Creek Development Corp., requesting a waiver of Ordinance Nos. 1774,1775 and 1805. Councilman Lopez moved this request be referred to the Planning Director and the City Attorney for a report and recommendation. Councilman Maxwell seconded – motion carried by the following vote: Ayes: Council members Kato, Lopez, Maron, Maxwell, and Takasugi. Noes: none. Absent: none.

Very truly yours,
/s/ Mabi Covarrubias
MISS MABI COVARRUBIAS
City Clerk
MC/esf

APPENDIX K

SEAL

CITY OF OXNARD
MEMORANDUM
May 1, 1980

To: City Manager

From: Planning Director

SUBJECT: Letter of Shelter Creek Development Corporation

Per your recent request, we have reviewed the letter of the Shelter Creek Development Corporation requesting relief (waiver) from Ordinance No. 1774, 1775 and 1805. These are the interim ordinances (no longer in effect) and the permanent ordinance regulating the conversion of apartments to condominium stock cooperatives and community apartments.

I believe you will recall that at the time of consideration of the permanent ordinance, representatives of Shelter Creek Development Corporation appeared before City Council requesting such relief. At that time, the Council declined to exempt the Shelter Creek Development Corporation from the provisions of Ordinance No. 1805.

It appears that Senate Bill 823 would preclude the ability of the City to impose the regulations of the State Subdivision Map Act in certain instances, but does not affect the City's ability to exercise police power via the provisions requiring a special use permit. This would apparently apply only to those reports filed with the Department of Real Estate prior to July 1, 1979. Those filed after that

date would be subject to the provisions of both the Subdivision Map Act and Special Use Permit Sections.

Since this matter is dealt with by ordinance, I do not believe that there is any administrative or legislative remedy available; however, I would refer to the judgment of the City Attorney in this regard.

Our recommendation, therefore, in this regard, would be the same as was expressed at the time of the previous discussion. There does not appear to be any prohibition against the City applying or requiring compliance with the provisions of the special use permit section, nor are there circumstances which would support a waiver of such requirements.

/s/ Gene L. Hosford
Gene L. Hosford, AICP

MGW: SAE: kms
cc: City Attorney

APPENDIX L

SEAL

CITY OF OXNARD
MEMORANDUM
May 21, 1980

To: City Council

From: City Attorney

SUBJECT: Shelter Creek Stock Corporative Conversion

On April 1, 1980, the Council adopted Ordinance No. 1805 requiring a special use permit for conversion of existing apartments to stock cooperatives, condominiums, and other community housing types. Representatives of Shelter Creek Development Corporation appeared several times opposing the application of the special use permit requirement to their project and requesting an exemption consistent with state law exempting their proposed conversion from the requirements of the Subdivision Map Act (SB 823, stats. 1979 ch. 1192). Although the Council declined to include an exemption in the ordinance as adopted, the request of Shelter Creek was referred to staff for further report. A memo dated May 1, 1980, from the Planning Director to the City Manager recommending no exemption is attached.

From a legal standpoint, we advised the Council prior to the adoption of Ordinance No. 1805 that the City probably had the authority under its police power to regulate stock cooperative conversions through a special use permit contrary to the opinion of the attorneys for Shelter Creek. The dispute centers on the provision in SB 823 which specifically exempts stock cooperative conversions

from the Subdivision Map Act if the owner had applied to the Department of Real Estate for a permit prior to July 1, 1979. Shelter Creek did so apply and is thus exempt from the Map Act requirements. The legal questions are (a) whether the Map Act exemption preempts all other regulations, and (b) whether the City has the power to regulate stock cooperative conversions in the absence of specific authorizing legislation.

Since we have discovered no new cases which would cause us to change our previous opinion that the City probably can require a special use permit for stock cooperative conversions, the action to be taken with respect to the request of Shelter Creek for an exemption is a matter of policy for the Council. From the developer's standpoint, an exemption is justified in view of the efforts to achieve conversion which began before the City or State imposed regulations and the fact that most tenants apparently favor or do not oppose conversion. There are apparently few if any other projects in the same situation so no precedent would be set by granting an exemption. On the other hand, conversion would remove a substantial number of rental units from the housing market and result in ownership units which apparently do not fully meet present standards. The resolution of these competing considerations is a matter of policy for the Council.

/s/ K. D. Lyders
K. D. Lyders

KDL:def

Attachment

APPENDIX M

Oxnard City Council
Regular Meeting
May 27, 1980

* * *

RPT. PRES. RESPONDING TO REQUEST F/EXEMPTION F/ORDINANCE NO. 1805 REQUIRING SPECIAL USE PERMIT F/CONVERSION OF EXISTING APTS. TO STOCK COOPERATIVES, CONDOMINIUMS, & OTHER COMM. HOUSING TYPES F234, F722

Mr. Mark Sellers, Deputy City Attorney, reviewed the report dated May 21, 1980, relating to a request from Shelter Creek's letter dated April 16, 1980, regarding exemption from Ordinance No. 1805, requiring a special use permit for converison of existing apartments to stock cooperatives, condominiums, and other community housing types. Mr. Gene Hosford, Planning Director, noted this matter was discussed at the public hearing adopting Ordinance No. 1805, and it was determined a special use permit would be required from all parties concerned. He advised Council the ordinance would need to be amended. Mr. Leo O'Hearn, 3650 Ketch Avenue, appeared to state Senate Bill 823 authorized local municipalities to regulate stock cooperative conversions as long as the ordinance exempts from regulation those stock cooperative conversions where an application for a subdivision public report was filed with the Department of Real Estate (DRE) prior to July 1, 1979. Mr. O'Hearn indicated Shelter Creek filed one year prior to July 1,

1979. Mr. O'Hearn told Council the ordinance was contrary to SB 823 and unenforceable. Mr. O'Hearn mentioned the residents of the complex had expressed an interest in buying, and he felt it would be beneficial to give them the opportunity. Mr. Joe Ruscio, 3711 Via Marina Avenue, appeared to point out there were many good reasons to have a special use permit, particularly for the best interest of the people purchasing the units. At 2:25 p.m., Councilman Maxwell was present. Councilman Lopez moved to deny the request from Shelter Creek for exemption from Ordinance No. 1805. Councilwoman Maron seconded – motion carried unanimously.

* * *

APPENDIX N

REPORTER'S TRANSCRIPT OF PROCEEDINGS
for Wednesday, May 14, 1986

L. O'Hearn – Direct

* * *

(Plaintiff's Exhibits 207, 210, 211, 212, 213, 221, 222, 225, 229, and 230 received in evidence.)

THE COURT: You may proceed.

MR. JACKSON: Thank you, your Honor.

Plus the transcript, your Honor, so the record will be complete.

THE COURT: They are received.

MR. JACKSON: Thank you.

Q. Mr. O'Hearn, Exhibit 207, 213, 212 and 230 are minutes of the City Council. The last of the series is 230, and on May 27, 1980, the minutes reflected the City Council denied your exemption; is that correct?

A. That is correct.

Q. Were you told that that was the final City act?

A. Yes.

THE COURT: All right.

MR. JACKSON: Excuse me, your Honor.

THE COURT: Finish it, and we are going to recess for the noon.

BY MR. JACKSON.

Q. Were you told there was no other administrative relief or legislative relief you could obtain?

A. Correct.

Q. Exhibit 205 reflects a memo from Mr. Hosford reflecting –

THE COURT: Mr. Jackson, we are going to recess. We will reconvene at one o'clock court clock time. Appears to be five minutes off. Be that as it may. Court clock, one o'clock. We will be having one recess in the afternoon running to four o'clock. Okay. Thank you.

(Lunch Recess.)

APPENDIX O

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

SHELTER CREEK DEVELOPMENT CORPORATION, a corporation, LEO A. O'HEARN and MARGARET E. O'HEARN, Plaintiffs, vs. CITY OF OXNARD, CITY COUNCIL OF OXNARD, and DOES 1 through 100, inclusive, Defendants.	Case No. 71306 JUDGMENT (filed Dec. 8, 1980)

Plaintiffs' motion for summary judgment came on regularly for hearing on November 24, 1980, in department 16 of the above-entitled court, before the Honorable Charles R. McGrath, presiding judge. Drummy Garrett King & Harrison by Alan I. White, appeared as attorneys for plaintiffs, and the Oxnard City Attorney by K. D. Lyders appeared for defendants. The court having considered the declarations and documents on file and the oral arguments of counsel, and the court having been fully advised herein, with good cause appearing therefore.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' motion for summary judgment is granted;

2. Oxnard Ordinance No. 1805 is invalid, void and unconstitutional as applied to the Shelter Creek Apartment Complex, located at 3650 Ketch Avenue, Oxnard, California ("Plaintiffs' Project"); and

3. Defendants City of Oxnard and City Council of Oxnard and their agents and employees, and each of them, are permanently enjoined and restrained from attempting to enforce or from enforcing Oxnard Ordinance No. 1805 as against Plaintiffs' Project.

DATED: December 5, 1980.

CHARLES R. McGRATH
JUDGE OF THE SUPERIOR COURT

APPENDIX P

REPORTER'S TRANSCRIPT OF PROCEEDINGS
for Thursday, May 15, 1986
Winegar – Direct

MATTHEW WINEGAR, PLAINTIFFS' WITNESS,
PREVIOUSLY SWORN
DIRECT EXAMINATION (RESUMED.)

BY MR JACKSON.

Q. Mr. Winegar, at the recess, I asked you if the staff had processed an application in 1980 ending up in a rejection in 1985 by the City Council on Shelter Creek itself.

Do you recall that question?

A. Yes, I do.

Q. And you answered affirmatively that it had?

A. I believe I answered that it was either in '85 or '84. I don't recall.

Q. In any event, an application was processed; is that correct?

A. That is correct.

Q. Was it after the amendment to the parking regulation to which you made reference?

A. Yes, it was.

Q. So, that, if anything, a more liberal interpretation of visitor parking would have been applied by the staff in terms of the new ordinance rather than the earlier ordinance?

A. That is correct.

Q. Did the staff as a part of that application process submit a report to the Planning Commission?

A. Certainly.

Q. As a part of that process, did that report include a check list showing in which ways the Shelter Creek project complied with 1805 and 7658?

A. The check list specifically references 7658, the resolution of standards.

Q. Thank you for the correction.

I take it it doesn't reference 1805?

A. That is correct.

Q. Was the application processed with 1805 in mind in any way?

A. Yes, it was.

Q. So, although the specific reference was not on the face, it was still a process on the basis of 1805; correct?

A. That is correct. And the staff report, I am sure, did analyze its compliance with the ordinance as well.

Q. And was there a presentation to the Planning Commission by the staff?

A. Yes, there was.

Q. And without asking the particulars, sir, what did the Planning Commission recommend in their final action to the City Council?

A. They denied the special use permit and recommended the denial of the tentative tract map for the condominium.

Q. In that recommendation, did they cite that Shelter Creek did not substantially comply with 7658?

A. I don't have the resolution before me. I can speculate that is the case.

Q. All right. Well, I will offer a document or show it to you in a minute.

And was that matter appealed to the City Council of Oxnard?

A. That is my recollection.

Q. And by the way, what was the Planning Commission's vote in respect to compliance?

MR. LYDERS: Your Honor.

THE COURT: Wait a second. Another way of stating relevance?

MR. LYDERS: Yes. I would object on the grounds of relevance.

THE COURT: Okay. I make the objection, sustain my objection, and ask you to ask another question.

MR. JACKSON: All right.

Q. With respect to the Planning Commission action, was it considered by the City Council?

A. Yes, it was.

Q. Was an appeal considered by the City Council?

A. Yes, it was.

Q. Was that the final action of the City Council on the matter. Was there a final action?

A. Yes, there was.

Q. What was that final action?

A. The Council voted to deny both the appeal and to deny the tract map.

* * *